Supreme Court, U.S.
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No._____

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**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1993

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A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

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PETITION FOR A WRIT OF CERTIORARI TO
THE UTAH SUPREME COURT.

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# PETITION FOR A WRIT OF CERTIORARI

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Petitioner

**VOLUME ONE**

PETITION
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## QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner's Constitutional due process right violated by the Utah Board of Bar Commissioners and the Utah Supreme Court?

2. Was Petitioner's disparate treatment by the Utah Board of Bar Commissioners and the Utah Supreme Court a violation of petitioner's consitutional and statutory right to equal protection.

## PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Supreme Court of Utah are A. Paul Schwenke, petitioner on his own behalf and Wendell Smith, Esq. on behalf of the Utah State Bar, Office of Bar Counsel and the Board of Bar Commissioners, Respondents.

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## OPINIONS BELOW

The judgment and decision of the Utah Supreme Court is provided in the Appendix ( A- to A- ). The decision was reported in *In Re Schwenke*, 865 P.2d 1350, 1354 (Utah 1993).

## JURISDICTION

The Utah Supreme Court entered its opinion on 12/01/93. A Petition For Rehearing was denied on 01/18/94. This Petition for a Writ of Certiorari was filed on 04/18/94. Jurisdiction is invoked pursuant to 28 U.S.C.S. Section 2101(c) and Rules 10 and 13 of the Rules of the Supreme Court of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person [shall] . . . deprived of life, liberty or property, without due process of law. . .

The Fourteenth Amendment to the United States

Constitution, Section 1 provides:

> All persons born or naturlized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Rights Under the Law Act [42 U.S.C. § 1981], provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedngs for the security of persons and property as is enjoyed by white citizens, . . .

## STATEMENT OF THE CASE

The Utah State Bar, Office of Bar Counsel ("Bar Counsel") filed a formal complaint against Petitioner on **December 4, 1990.** (Record ("R") 2-10 [Appendix Av-1-2 to 17]. An attempt to serve a summons and copy of the formal complaint was also made the same day by mail to petitioner's former office address at 165 South West Temple, Suite 100, Salt Lake City, Utah 84111. R.1-10 [Appendix Av-1-1 to 2].

Petitioner did not receive actual notice of the formal complaint, did not file an answer to the formal complaint, and consequently, identical default certificates were entered on **March 19, 1991**, and again on **March 28 1991**,[1] as to the liability portion of the formal complaint. Transcript of March 2, 1992 hearing (hereafter "TSH"), pp. 16-19,(R. 24-27), Supplemental

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1. There is no explanation why Bar Counsel obtained two identical default certificates, in March of 1991.

Record ("SR") 42-45 Appendix Av-4-32 to 40]. A sanctions hearing based on the entry of the default was set a year later on **March 2, 1992**. (R. 79-80) [Appendix Av-3-1 to 2]. Petitioner attended the sanctions hearing. TSH pp. 2, 17-19, ("S.R." at 28, 43-45) [Appendix A-4-34 to 40]. The sanctions hearing was before a three member Hearing Panel designated by the Board of Bar Commissioners ("Bar Commission"). (S.R. 25)].

**(a) Due Process and Equal Protection violations were raised to the Hearing Panel at the March 2, 1992 hearing.**

Petitioner objected to the sanctions hearing on the ground that service of process was constitutionally defective:

> "MR. WALLACE:
> . . . As I see it, you basically have three positions concerning your objections to going forward; one is that you were not personally served, is that correct?
>
> MR. SCHWENKE:
> . . . That's correct.

MR. WALLACE:
The second is that you received no actual notice of the complaints against you . . . that's one of your arguments, that you didn't have sufficient notice . . .."
TSH p.18 (S.R. 44) [Appendix Av-4-37 to 38].

The record was clear that petitioner was not personally served nor was he served by registered mail at his address shown on the official roster of attorneys of the Utah State Bar, as required by the Procedures of Discipline of the Utah State Bar ("Bar Rules"). TSH p.21 (S.R. 47) [Appendix Av-4-42 to 44; Av-21-1 to 2]. That address was listed on the Bar roster as P.O. Box 57853, Murray, UT 84107. (R. 112)]. The Hearing Panel was persuaded by Bar Counsel's misrepresentation that the rule only required that petitioner be served at his last known address. TSH p.26 (S. R. 52) [Appendix Av-4-52 to 53].

MR. SMITH [BAR COUNSEL]:
. . . [T]he Utah State Bar, therefore, is entitled to rely upon the rules, and the rules say that we can -- we can obtain service by -- by mail to his last

> known address, that's what has occurred. . . . And the record speaks for itself, as far as the documents you have in the official file which show that we have obtained service in accordance with the rules, that the summons and complaint was served in accordance with the rules, that defaults have been entered in accordance with the rules, . . . TSH, pp. 22-23 (S.R. 48-49) [Appendix Av-4-44 to 47]

Accordingly, the panel overruled petitioner's due process objection stating, in part, as follows:

> MR. WALLACE:
> . . . [C]oncerning the lack of notice and the lack of personal service, the Bar of Disciplinary Rule does indicate that service may be at -- by registered mail at the last known address; whether or not that provides due process is another question, but that's the rule and we operate under the rule. TSH, p.26 (S. R. 52) [Appendix Av-4-53 to 55].

This March 2, 1992 hearing was also treated by the Utah Supreme Court as a hearing on the merits of the formal complaint, with the Supreme Court ruling as follows:

> Although Schwenke was in fact in default, he was nevertheless <u>afforded a full-scale hearing on the merits of the allegations against him</u>.

*In Re Schwenke,* 865 P.2d 1350, 1355 (Utah 1993)[Appendix Ai-19]

Contrary to this finding by the Utah Supreme Court, the Bar Hearing Panel did not conduct a hearing to establish the merits of the formal complaint. TSH pp.28,30 (S.R. 54, 56) [Appendix Av-4-55 to 57; Av-4-59 to 61]. Rather, the allegations of the complaint were deemed admitted pursuant to the entry of default, and the Hearing Panel addressed only the issue of sanctions, although it heard evidence bearing on mitigation and aggravation of the charges as they related to the issue of sanctions. TSH pp.28,30, 147 (S.R. 54, 56, 173) [Appendix Av-4-55 to 57; Av-4-59 to 61]. Some of the evidence related to mitigation and aggravation also coincidentally dealt with the merits of the complaint on some issues, but it does not mean that the Hearing Panel considered this evidence for the purpose of adjudicating the merits of the allegations of the

complaint. TSH, pp. 28,30 (S.R. 54, 56) [Appendix Av-4-55 to 57; Av-4-59 to 61]. Bar Counsel made this point very clear at the hearing.

> MR. SMITH:
> Just like to clarify then that we are going on assumption that the service was had, that the order -- that the order entering the default has been properly entered?
> TSH, p. 28 (S.R. 54) [Appendix Av-4-55 to 57].

> MR. SMITH:
> I again point out that the Utah State Bar is entitled to rely on the default that was taken in this case and we came here today relying on that default and we're entitled to rely on that default, those matters are established as true.
> TSH, p. 147. (S.R. 173) [Appendix Av-4-271 to 273].

Petitioner raised the disparate treatment issue in his closing argument, pointing to his former partner receiving probation for the same charges brought against petitioner, while Bar Counsel was seeking disbarment against petitioner. TSH pp.145-146 (S.R. 171-172) [Appendix Av-4-267 to 271]. The Hearing Panel recommended *inter alia* that petitioner be disbarred from

the practice of law. (R.193) [Appendix Av-5-1 to 23]. However, the hearing panel did not address the equal protection issue. (R. 182-194) [Appendix Av-5-1 to 23]. On **May 4, 1992**, the Bar Commission entered its Order adopting the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Hearing Panel. (S.R. 18)[Appendix Av-6-1 to 3]. On **May 5, 1992**, Petitioner filed his Motion for Reconsideration of the Order Adopting the Findings of Fact, Conclusions of Law and Recommendation of Discipline. (R. 110) [Appendix Av-7-1 to 2].

**(b) Due Process and Equal Protection violations were again raised pursuant to petitioner's Motion for Reconsideration.**

Petitioner's motion for reconsideration was grounded on the same alleged due process and equal protection violations raised at the March 2, 1991 hearing. See *Memorandum in Support of Motion for Reconsideration*, p. 1-11, (R. 111-121) [Appendix Av-8-

1 to 23]. A hearing on Petitioner's Motion for Reconsideration was held before the Bar Commission on **May 28, 1992**. (S.R. 10) [Appendix Av-11-1 to 9]. No transcribable record was kept of this hearing. The Bar Commission deliberated after petitioner was excused. See, *James Z. Davis Affidavit* ("Davis Affidavit") paragraph 8 [Appendix Av-26-5]. No transcribable record was kept of such deliberations. The Bar Commission granted petitioner's Motion for Reconsideration. (S.R. 23) [Appendix Av-11-1 to 9]. Following the hearing, James Z. Davis, the Bar Commission president, contacted Bar Counsel, *ex parte*, and instructed him to draft the order granting petitioner's Motion for Reconsideration. See *Davis Affidavit*, paragraph 9 [Appendix Av-26-5]. The Davis Affidavit was an extra-judicial affidavit inappropriately submitted to the Utah Supreme Court, outside of the record, on November 13, 1992, almost six weeks after the appeal

was filed. See *Davis Affidavit*, p.3 [Appendix Av-26-4]. As shown below, the Utah Supreme Court expressly relied on this affidavit in its ruling.

Bar Counsel drafted the order without any consultation with petitioner. See *Davis affidavit*, paragraph 9. [Appendix Av-26-5]. James Davis signed the order on June 8, 1992, but did not place the order in the mail to petitioner until June 16, 1992. (S.R. 23) [Appendix Av-11-9]. Petitioner saw the order for the first time on or about June 19, 1992, after it was signed and entered. (S.R. 23). Petitioner was shocked with the content of the order. First, it contained unnecessary, inflammatory, prejudicial material -- a false statement -- included for no apparent reason other than to smear petitioner's honesty.

> Respondent [petitioner here] further represented to the Board [Bar Commission] that he did not learn of the Sanctions hearing scheduled for March 2, 1992, until he arrived in Salt Lake on another matter.

> Assistant Bar Counsel advised the Board that Respondent told the Hearing Panel that he learned of the Hearing from someone residing at the address in Las Vegas, Nevada to which the notice of Hearing was mailed." *Findings and Order Granting Respondent's Motion For Reconsideration,* p. 2-3 (R. 20-21) [Appendix Av-11-3 to 4].

The Utah Supreme Court relied on this false statement in its published decision in this case:

> Schwenke appeared at the Sanctions hearing and admitted that he received the notice of the hearing on February 6, 1992, at the Las Vegas residence. *In Re Schwenke, supra* at 1355. [Appendix Ai-18 to 19].

The true fact was that the petitioner told the Bar Commission the truth. The following exchange from the transcript of the March 2, 1992 hearing bears this out:

> MR. WALLACE [PANEL CHAIRMAN]:
>
> Now, I notice that you're here today; what notice did you have of this hearing and when did you receive that notice?
>
> MR. SCHWENKE:
>
> When I appeared in my--the roll-call hearing in February before Judge Hutchings [a judge in Third Circuit Court in Salt Lake City], I appeared with Mr. Johnson, and -- and then he so advised me. TSH, p.17 (S.R. 43) [Appendix Av-4-34 to 35].

The order was also internally inconsistent. It found that the service of process was proper, although, it also implied that all of the proceedings through and including March 2, 1992, had been unfair, and consequently, granted petitioner's motion which was grounded primarily on his charge of defective service of process. (S.R. 21-23) [Appendix Av-11-1 to 9]

Petitioner filed his objection to the order granting his motion for reconsideration on **June 29, 1992.** (R. 127-129) [Appendix Av-12-1 to 5]. Because the order also required petitioner to file an answer in 10 days, petitioner filed a motion to quash service of the original summons on June 29, 1992. (R.90-91) [Appendix Av-12-5 to 8]. A week after petitioner filed his Objection (on **July 7, 1992**), Bar Counsel, to avoid addressing the merits of the Objection to Findings, Conclusions and Order that he prepared improperly, caused the petitioner

to be served with a new summons and the original formal complaint. (R.92-94)) [Appendix Av-1-1 to 17]. Prior to serving the new summons, no leave of court was requested, nor obtained, by the Bar Counsel from the Bar Commission to serve the summons and complaint out-of-time. Although, petitioner prepared his Answer to the formal complaint on **July 15, 1992,** through inadvertence he did not file such Answer until **August 5, 1992.** (R. 100-103) [Appendix Av-15-1 to 4].

On **July 31, 1992,** a new default was entered, based on the invalid service of process attempted on July 7, 1992. (R.97-98) [Appendix Av-14-1 to 2]. On **August 10, 1992,** the Bar Commission denied Petitioner's Motion to Quash on the basis that it was "rendered moot by the personal service on July 7, 1992." (R. 137) [Appendix Av-16 to 2]. The Bar Commission also denied Petitioner's Objection to the Findings and Order Granting Respondent's Motion for

Reconsideration, stating that petitioner could raise the issues contained in the objection when the hearing panel reconvened to rehear the case. (R. 137) [Appendix Av-16-2]. On the same day (**August 10, 1992**), Bar Counsel filed a Motion to Affirm Findings Conclusions and Recommendations of the Hearing Panel. (R.144) [Appendix Av-17-1 to 3]. Obviously, Bar Counsel intended for the Bar Commission to adopt the Hearing Panel's recommendations from the March 2, 1992 hearing. (R.144). However, those Findings, Conclusions and Recommendations had been effectively vacated by the June 8, 1992 Order granting petitioner's motion for reconsideration. (R. 120-121) (S.R. 23) [Appendix Av-11-1 to 9]. See, Reasons for granting Writ, *infra*.

**(c) Federal due process questions were raised in petitioner's brief filed on appeal to the Utah Supreme Court.**

Petitioner appealed the September 3, 1993 Order on the ground that the default entered July 31, 1992,

should be vacated. See *Notice of Appeal* [Appendix Av-19-1 to 10]. In Petitioner's Appellate Brief and Petitioner's Appellate Reply Brief, petitioner raised due process violations concerning the irregularity and the lack of integrity of the Appellate Record, and the attempt by the Bar to improperly raise and address issues outside the scope of the appeal. See Petitioner's Appellate Brief and Petitioner's Reply Brief [Appendix Av-24-1 to 56]. The Utah Supreme Court by Order/Opinion entered on December 1, 1993, affirmed the Bar Commissioners' Findings, Conclusions and Recommendations on the grounds that the December 4, 1990 service of process was valid. *In Re Schwenke, supra.*

**(d) The Federal due process questions were raised on the petition for rehearing.**

Petitioner raised several new due process violations and the same due process issue discussed

above in his petition for rehearing. See *Petition for Rehearing*, Appendix Av-20-1 to Av-20-33. The Utah Supreme Court denied the motion for rehearing without an opinion. *In Re Schwenke, supra.*

## REASONS FOR GRANTING THE WRIT

### (1) THIS APPEAL PRESENTS AN IMPORTANT QUESTION OF LAW LIKELY TO RECUR UNLESS THE DECISIONS OF THE UTAH BAR COMMISSION AND THE UTAH SUPREME COURT ARE SUBJECT TO REVIEW BY THIS COURT FOR POTENTIAL VIOLATIONS OF FEDERAL LAWS.

The Utah Supreme Court, which is the court of last resort in the State of Utah, has exclusive jurisdiction to discipline attorneys licensed to practice law in the State. *Constitution of Utah, Art. VIII, § 4; Utah Code Ann. § 78-2-4.* As demonstrated in this case, constitutionally protected rights can be violated during the disciplinary proceedings and if certiorari is not available such constitutional violations will continue unabated in this case and will likely recur in other cases.

If certiorari is not available, the Utah State Bar Commission and Utah Supreme Court can continue to violate constitutional rights, with impunity without accountability and lawyers like the petitioner will have no mean of redressing violations of their constitutional rights. The Tenth and Ninth Circuit courts have held that relief from attorney disciplinary orders of the state supreme courts is available only to this court by a petition for writ of certiorari based on violations of the due process or equal protection clauses of the Fourteenth Amendment. *Gately v. Sutton,* 310 F.2d 107, 108 (10th Cir. 1962); *Clark v. State of Washington,* 366 F.2d 678 (9th Cir. 1966). As shown below, this case falls well within the allowable limits of certiorari review.

Rule 10, Rules of the Supreme Court, requires that this petition for a Writ of certiorari will be granted only if there are special and important reasons for it. Rule

10(c) indicates that a special and important reason is when a "State Court has ... decided a federal question in a way that conflicts with applicable decisions of this court." Surely, the decision by the Utah Supreme Court in this case, which is fraught with violations of Federal law, and deprives petitioner of his constitutional rights is per se in conflict with decisions of this courts which upholds Federal laws.

**(2) THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A RULING OF THE UTAH SUPREME COURT DENYING PETITIONER HIS PROPERTY RIGHT TO PRACTICE LAW WHERE THE RULING WAS REACHED AT THE EXPENSE OF PETITIONER'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS.**

It is undisputed that petitioner's right to practice law is a constitutionally protected property or liberty right entitled to due process safeguards. *Sware v. Board of Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; *Willner v. Committee on Character and Ethics,* 373 U.S. at 102, 83 S.Ct. 1175, 1179 (1963).

One of the main issues presented for review is whether petitioner's right to due process was violated during the disbarment proceeding before the Bar Commission and the Utah Supreme Court.

Due process requires actual notice of suspension or disbarment proceedings, *Matter of Discipline of Schwenke*, 849 P.2d 573, 576 (Utah 1993), and if actual notice cannot be accomplished, constructive notice must at a minimum be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). A party is not "apprised" of the proceeding unless it properly advises of the subject matter of the pending hearing. *Aetna Insurance Company v. Hartshorn*, 477 F.2d 97 (1973)[A notice of a hearing on motions in connection with

consolidation of actions violated due process when the judge after disposing of the motion proceeded to hear claims on the merit.] Additionally, the notice must "permit [the affected individual] adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 14, 98 S.Ct. 1554, 1563, 56 L.Ed.2d 30 (1978).

Due process also requires that if a state enacted a statutory scheme for substitute service by statute or rule, the proceedings must " strictly comply" with the statutory scheme. *Murdock v. Blake,* 484 P.2d 164 (Utah 1971); *Lloyd v. Third Judicial District Court,* 495 P.2d 1262 (Utah 1972); *Garcia v. Garcia,* 712 P.2d 288 (Utah 1986); *Gookin v. State Farm Fire And Cas. Ins. Co.*, 826 P.2d 229, 233 (Wyo. 1992) citing generally 62B Am. Jur.2d, Process § 4 (1990); *Lisowski v. Schaack*, 71 F.R.D. 570, 572 (S.D. Cal. 1976); *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*,

953 F.2d 21, 24 (1st Cir. 1992); *Graff v. Kelly*, 814 P.2d 489, 495 (Okl. 1991). As shown in this case, Bar Counsel did not even attempt to comply with Rule 4(g), URCP, for substitute service on petitioner.

(a) **The Utah Supreme Court ruling validating the December 4,1990 service of process violates Federal due process.**

Rule XI(b) [Appendix Av-21-1 to 3] of the Utah Bar Rules governs the procedure for service of process in attorney disciplinary matters. The rule provides, in pertinent part:

> "Service shall be made personally upon the attorney in question or by certified mail to the last known address as shown by the official roster of attorneys of the Bar." *Id.*

The Utah Supreme Court, in another matter involving petitioner here, construed Rule XI(b) to require actual personal service.

> We think that suspension and disbarment proceedings call for adherence to minimum requirements of procedural due process, including notice of a hearing and notice that the attorney's

> license has been restricted or withdrawn. We therefore hold that service by certified or registered mail must be on the attorney personally and cannot be accomplished by delivery to a common-area receptionist at the address of the attorney's office. Such delivery does not amount to constructive notice. Nothing in the record or in the findings disputes [defendant's] claim that the signature on the return receipt was not that of his personal agent. We acknowledge that actual personal service will often be required when service by mail is ineffectual. However, in suspension or disbarment proceedings, actual notice is essential" *Matter of Discipline of Schwenke*, 849 P.2d 573, 576 (Utah 1993).(Emphasis added).

Accordingly, Rule XI(b) requires personal service of the summons and formal complaint on the attorney involved or his agent for service of process in either of two methods: (1) actual personal service, or (2) personal service by mail as reflected by the attorney's signature on the return receipt of a certified or registered mail that contained the summons and formal complaint. *Matter of the discipline of Schwenke, supra.* It is clear that Bar Counsel did not accomplish Rule XI(b) personal service

in this case. Rather, Bar Counsel only attempted Rule XI(b) service by mailing the summons and complaint by certified mail to the premises where Petitioner had last practiced law. The certified letter was apparently received and signed for by a Norma Davis, who turned out to be the temporary common-area receptionist at such address. It is undisputed that Norma Davis was not Petitioner's agent for service of process. As a result of the defective attempt at service, petitioner never received actual notice of the case.

Significantly, Bar Counsel only tried to serve Petitioner pursuant to the Rule XI(b). It is also important to note that Rule XI(b) does not provide for alternative or substitute service. However, where the Bar Rules are silent, Utah Rules of Civil Procedure (URCP) should be used to fill in the gap. *Rule 81(a),*[2] *URCP.* [Appendix

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2. Rule 81(a) provides, in pertinent part:

"These rules shall apply to all special

Av-22-19]. Rule 4(g), URCP [Appendix Av-21-4] governs "other service" where personal service could not reasonably be accomplished. Rule 4(g) provides, in pertinent part:

> "Other service. Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence ... the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served ... If the motion is granted, the court shall order service of process by publication, by mail from the clerk of the court, by other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event

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statutory proceedings, except insofar as such rules are by their nature clearly inapplicable."

> or events as of which service shall be deemed complete. A copy of the court's order shall be served upon the defendant with the process specified by the court." *Rule 4(g), URCP.*

The Utah Supreme Court ruling is based on a finding that Bar Counsel followed this rule for alternative or substitute service. However, there is absolutely no evidence in the appellate record that Bar Counsel even attempted to follow this rule prior to December 4, 1990. First, no motion was filed for leave to serve petitioner by any means other than the required manner of personal service set forth in Rule XI(b). Second, there were no supporting affidavits providing evidence of the diligent efforts made by the Bar to personally serve petitioner, setting forth the circumstances which made personal service of petitioner impracticable. Third, there was no court order granting leave to serve petitioner by means other than personal service, and setting forth the manner in which such alternative service should be

accomplished, as well the event or events as of which such alternative service would be deemed to be completed. Finally, there is no evidence that any order permitting alternative service was served with the summons and complaint on December 4, 1990.

How then, could the Utah Supreme Court arrive at its finding that Bar Counsel used reasonable diligence before December 4, 1990, in support of its conclusion that the substitute service upon petitioner in this case was proper? The answer reveals a criminal act by Bar Counsel and Bar Commission in this case. In arriving at its decision, Utah Supreme Court relied exclusively on one piece of evidence - the illegal extra-judicial affidavit of Stephen Trost that surreptitiously showed up in the official record on October 16, 1992, two weeks after the appeal was filed and over two years and ten months

after the attempted service of process on December 4, 1990.[3]

The fraud perpetrated by Bar Counsel and negligently caused by the Bar Commission was not discovered until petitioner was preparing this petition. Accordingly, evidence of the fraud was not before the Utah Supreme Court.

It seems clear from a close review of the file that Bar Counsel knew at the time of the Motion for Reconsideration that the service was defective, because he had not followed the procedure for proper service upon petitioner. He argued at the Motion for Reconsideration that Rule XI(b) service was proper, but he also included a general reference to "due diligence"

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3. It's highly unlikely that Bar Counsel did any investigation, where the record is clear that only one attempt at personal service was ever made, and that attempt was made on the same day the formal complaint was filed.

effort by his office to serve petitioner. However, Bar Counsel could not list any details of the "reasonable diligent" effort because it did not happen.

> The Bar exercised reasonable diligence to learn where Respondent could be reached and sent documents to those addresses where they should have been received by Respondent. *Response to Motion for Reconsideration*, P.2 (The pages are not numbered but it is the second page.) [Appendix Av-9-3]

It is revealing that in May, 1992 Bar Counsel did not assert any details concerning the "diligent investigation" that it purportedly undertook to serve petitioner on December 4, 1990. It also appears to be more than a coincidence that, although, this particular document is docket-stamped May 21, 1992, there is no original of this document in the official file. Rather, the only place this document appears in the file with the docket stamp is on page 212 of the Appellate Record, where a copy is buried in the file as exhibit #8 to the August 10, 1992 Memorandum of Points and Authorities

in support of the Motion to Affirm Findings, Conclusions and Recommendation of the Hearing Panel. (R. 212). Apparently, Bar Counsel had access to the official file to make a copy but chose not to put the original back in the file. This irregularity in the file creates at least an inference that Bar Counsel ,with cooperation of the Bar Commission, was trying to keep this document from attracting attention?

In light of all the problems with the official file, which petitioner raised by objection in his Appellate Brief [Appendix Av-24-10 to 14] to the Utah Supreme Court, it appears more than likely that Bar Counsel was manipulating the file to hide the fraud that was being perpetrated. For instance, about half of the documents in the official file are not docket-stamped, so there is no way to verify when a document was actually placed in the file. The documents are not in chronological order and many of the documents are not in any kind of

logical order at all. For example, the June 8, 1992 Order granting petitioner's Motion for Reconsideration is in the official file after the September 3, 1993 Order Affirming Findings, Conclusions and Recommendation; in fact, it is included in a separate, supplemental file, even though it was signed on June 8, 1992. In addition, two documents which were obviously filed, the Findings, Conclusions and Recommendation dated April 20, 1992, and Bar counsel's Response to Motion for Reconsideration dated May 21, 1992, do not even appear in the record at all, except as exhibits #5 and #8, respectively, attached to Bar Counsel's Memorandum of Points and Authorities in Support of Motion to Affirm Findings, Conclusions, and Recommendation of Hearing Panel, dated August 10, 1992. (R. 182-194, 212-215) [Appendix Av-17-3 to 14].

When the Motion for Reconsideration was granted, Bar Counsel knew than that his Rule XI(b)

service was defective and unless he could show reasonable diligence, his case would have to start from scratch and ultimately have to go to trial. From that point on, Bar Counsel schemed to plant in the official record some evidence that his office used "reasonable diligence" to locate petitioner prior to December 4, 1990.

The July 31, 1992 default gave Bar Counsel an opportunity to manufacture the fraudulent affidavit of Stephen Trost. He filed a Motion to affirm Findings, Conclusions and Recommendation of the Hearing Panel with a supporting memorandum on **August 10, 1992.** These documents with their attachments are in the official record, but are not docket stamped with the date they were filed with the Bar Commission. The supporting memorandum made reference to an investigation conducted prior to the service of the summons on December 4, 1990, by Bar Counsel,

Stephen Trost.

> Prior to serving Respondent [petitioner] by mail Bar Counsel, Stephen A. Trost, spoke with Jamis M. Johnson, Respondent's associate, who stated that he would forward to Respondent all correspondence addressed to Respondent which was received at his office at 165 South West Temple, Salt Lake City, Utah. In reliance upon that representation of Mr. Johnson, and the investigation done by the Office of Bar Counsel, the summons and formal complaint were sent by certified mail to Respondent at Mr. Johnson's office. The documents were received at that address and were not returned by the post office. The affidavit of Stephen A. Trost is attached hereto as Exhibit #2, and incorporated herein. Memorandum in support of Motion to Affirm Findings, Conclusion and Recommendation of Hearing Panel, P.2 (Pages are not numbered, but this is the second page) (Emphasis added) (R. 147) [Appendix Av-17-5 to 6]

The affidavit of Stephen Trost was alleged to have been attached as Exhibit #2 to the Memorandum, purportedly filed on August 10, 1992. (R.151) [Appendix Av-17-1 to 17]. The Trost affidavit could not have been attached to this Memorandum on August 10, 1992 because it was not yet in existence. The Trost

affidavit was not in existence on September 3, 1992, when the Bar Commission granted the Motion to Affirm the Findings, Conclusions and Recommendation. And, the Trost affidavit was still not in existence at the time the appeal was filed with the Utah Supreme Court on October 2, 1992. In fact, the Trost affidavit could not have made its appearance in the official court file until October 16, 1992, the date the affidavit was executed, which was the same day the official record was certified to the Utah Supreme Court. (R. 171-172) [Appendix Av-26-7].

Let us examine how Bar Counsel, with Bar Commission cooperation could accomplish this fraud. It appears that Bar Counsel knew the record was going to be certified to the Utah Supreme Court on October 16, 1992. The official record at that point did not have any evidence of Bar Counsel "diligent effort" to serve petitioner. Therefore, the Trost affidavit was secured

to be included in the official record, the same day. Bar Counsel then deceptively attached the affidavit to the August 10, 1992 Memorandum in Support of the Motion to Affirm Findings, Conclusions and Recommendation. Furthermore, the Trost affidavit was buried in with 11 other mostly irrelevant and extraneous exhibits attached to the Memorandum, to minimize the probability of discovery. The deception is also evident from the fact that the memorandum, with its numerous attachments, exhibits, and the false affidavits was not docket-stamped, apparently, to hide the discrepancy in the dates.(R.146-232) [Appendix Av-17-1 to 17]

The Trost Affidavit, although very vague, is the first document that shows any details of the Bar Counsel's purported "diligent effort" to serve petitioner. Stephen Trost, under oath, stated:

> 3. Due to the severity of the charges against Mr. Schwenke and his lack of response, I personally visited in or about December of 1990 the law

> office of Jamis Johnson located at 165 South West Temple, Suite 300, Salt Lake City, Utah where Mr. Schwenke office shared. See Exhibit A 1991 Capitol Reporters Legal Directory; Exhibit B a letter from Judge Murphy with enclosure [Feb. 1, 1991]; Exhibit C withdrawal of Counsel [Jan. 9, 1991] - all indicating 165 S. West Temple as the correct office address. *Affidavit of Stephen Trost*, para. 3. (R.171) [Appendix Av-17-6]. (Dates inserted for Exhibits B and C).

The summons and complaint was served on December 4, 1990, which was a Tuesday. Thus, Mr. Stephen Trost's investigation in or about December, 1990, prior to serving the summons and complaint, must have taken place between Saturday, December 1; Sunday, December 2; and Monday, December 3. The exhibits offered by Trost to prove his investigation prior to December 4, 1990 are documents dated in 1991. How Mr. Trost could rely on 1991 documents to determine the right address for service on December 4, 1990, boggles the mind.

Perhaps the most blatant misrepresentation

contained in the affidavit is Mr. Trost's claim that prior to serving the summons and formal complaint on December 4, 1990, he personally visited Mr. Jamis Johnson at Mr. Johnson's office where, Trost spoke to Mr. Johnson, and Mr. Johnson made the following representations:

1. If Mr. Trost used the 165 West Temple address to serve pleadings Mr. Johnson would see to it that Schwenke would receive the pleadings.
2. He confirms that Schwenke was no longer residing in the State of Utah.
3. Johnson had a telephone number and address of Schwenke's ex-wife in Las Vegas, where Schwenke could be reached.

Petitioner could have rebutted these false allegations, if he had been given the opportunity. In order to demonstrate this fact, petitioner has included the extra-judicial Affidavit of Jamis Johnson and refers to it in this brief, for that purpose only. The statement that Mr. Trost visited Mr. Johnson in his office prior to December 4, 1990, and the alleged representations made by Mr.

Johnson stated above, are absolute fabrication by Mr. Trost. See the extra-judicial *affidavit of Jamis Johnson*, [Appendix Av-23-1 to Av-23-3]. Mr. Jamis Johnson is certain he did not meet with Mr. Trost about this case anytime before December 4, 1990. *Johnson affidavit, paragraph 3* [Appendix Av-23-2]. Mr. Jamis Johnson knew that petitioner did not leave the state until mid-January, 1991 and he is certain that he did not tell Mr. Trost, prior to December 4, 1990, that Schwenke had already left the state. *Johnson affidavit,* paragraph 4 [Appendix Av-23-2]. Mr. Jamis Johnson knew that petitioner's ex-wife did not move to Las Vegas until mid-February, 1991, and he is certain that he did not make a representation to Mr. Trost, prior to December 4, 1990 concerning an address in Las Vegas that was not in existence until February, 1991. *Jonhson affidavit,* paragraph 6 [Appendix Av-23-2 to 3]. In fact, Schwenke's ex-wife was still doing accounting work in

Mr. Johnson's office in December, 1990. *Johnson affidavit,* paragraph 6 [Appendix Av-23-2 to 3].

Worse still, the Utah Supreme Court relied exclusively on Trost affidavit to find that petitioner was properly served with the summons and formal complaint on December 4, 1990.

> We now turn to the merits. While Schwenke raises several issues relating to the default entered against him for failure to answer the July 7, 1992, formal complaint within the time prescribed in the summons, we conclude that whether Schwenke was properly served with the December 4, 1990, summons and formal complaint is the dispositive issue. *In re Schwenke, supra.* at 1354. [Appendix Ai-14].

In concluding that the December 4, 1990 service was proper, the Utah Supreme Court made the following factual findings:

> (1) "The Bar investigated and determined that if the summons and formal complaint were mailed to Schwenke's last known address as shown by the official register of the attorneys of the Bar, in strict compliance with the rule, it was unlikely that Schwenke will receive them." *In Re Schwenke, supra.* at 1354. [Appendix Ai-16].

(2) "Before the summons and formal complaint were mailed, however, Bar counsel Stephen A. Trost met with Jamis M. Johnson, an attorney who subleased office space to Schwenke at the time. Johnson assured Trost that all mail sent by the Bar to Johnson's office (the same address where Schwenke had been practicing) would be forwarded to Schwenke. Accordingly, the summons and formal complaint were mailed to this address." *In Re Schwenke, supra.* at 1351. [Appendix Ai-4 to 5].

Therefore, it is crystal clear that, but for the false extra-judicial affidavit of Stephen Trost, illegally inserted in the official record by Bar Counsel, with the acquiescence of the Bar Commission, the Utah Supreme Court would not have had any factual basis for its holding. Unquestionably, this fraud on the court was patently violative of petitioner's due process rights, and resulted in the taking of his license to practice law without due process of law.

The Utah Supreme Court ruling, even assuming *arguendo* that it was not based on illegally manufactured evidence, is bad law and violated petitioner's due

process rights. As stated above, the prevailing view is that there must be a minimal showing that the attempted substitute service strictly complied with the statutory scheme. *See* cases cited above at pp. 17-19. Here, the Utah Supreme Court ruled that the Bar had exercised "reasonable diligence in good faith" based on Stephen Trost's affidavit. *In re Schwenke, supra,* 865 P.2d at 1355. [Appendix Ai-18]. However, the Trost affidavit merely stated that Stephen Trost visited Jamis Johnson at his office in or about December, 1990, and Jamis Johnson assured Stephen Trost that pleadings would be forwarded to petitioner. The Stephen Trost affidavit and the allegations contained in it hardly qualified for compliance with the statute. The affidavit needed to show that the identity or whereabouts of petitioner was unknown and could not be ascertained through reasonable diligence. *Rule 4(g) URCP* [Appendix Av-21-4 to 6]. The affidavit also needed to set forth in

detail the efforts made by Bar Counsel to identify, locate or serve the petitioner. *Id.* So, even if the Trost affidavit was available prior to December 4, 1990 to support a motion under Rule 4(g), the affidavit would not have been sufficient. See for example cases construing a rule similar to Rule 4(g), URCP. *Kintigh v. Elliot,* 570 P.2d 659 (Or. 1977); *A. Ter Har v. Backus,* 487 P.2d 660 (Or. 1971). If the belated affidavit is insufficient to support a Rule 4(g) motion, and no motion was ever filed and no court order allowing alternative service was ever issued, it would seem absurd for the Utah Supreme Court to conclude that Bar Counsel had complied with Rule 4(g).

The Utah Supreme Court ruling also implies that Jamis Johnson's alleged representations to Stephen Trost is binding on petitioner. Such implication is in direct contravention of prevailing law. An attorney is not an agent for service of process upon his client

unless the client has expressly or implied authorized the attorney to act in that capacity. See, e.g., *In Re Riverfront Food And Beverage Corp.*, 29 B.R. 846, 853 (E.D. Mo. 1983); *Bardahl Manufacturing Corp. v. District Court*, 372 P.2d 447, 449 (Colo. 1962). Additionally, the attorney's authority to act as agent for service of process cannot be based on representations solely by the attorney that he is so authorized. In *Re Riverfront Food And Beverage Corp., supra*, 29 B.R. at 853. Thus, Johnson's alleged representation to Stephen Trost, assuming *arguendo* that it was true does not bind the petitioner. This is particularly true, where Jamis Johnson was not even petitioner's attorney.

Because Jamis Johnson's representations were not binding on petitioner, and because Bar Counsel did not comply with the statutory scheme for substitute service, due process is violated by the mere act of the court exercising judicial power. *Cate v. Archon Oil Co.*,

*Inc,* 695 P.2d 1352 (Okl. 1983) citing the following: *Boddie v. Connecticut,* 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971); *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *Schroeder v. New York,* 371 U.S. 208, 211, 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.I.R.2d 1398 (1962). *Riverside & Dan River Cotton Mills v. Menefee,* 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910 (1915); *Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363, 1369 (1914). The inescapable conclusion in light of the foregoing is that the criminal fraud perpetrated by Bar Counsel and acquiesced in by the Bar Commission, the failure of Bar Counsel to comply with Rule 4(g), and the Utah Supreme Court's invalid exercise of jurisdiction all violated petitioner's due process rights.

**(b) The Utah Supreme Court ruling that the March 2, 1992 hearing was a hearing on the merits of the formal complaint violated Federal due process.**

The notice of the March 2, 1992 hearing is

entitled as follows:

**NOTICE OF HEARING**

F-322 AND F-478
(CONSOLIDATED)

The body of the notice is stated verbatim as follows:

> TO: A. PAUL SCHWENKE
>
> Notice is hereby given that a hearing in the above-entitled matter will be heard Monday, March 2, 1992 at 9:00 a.m. in the Utah State Bar Offices, 645 South 200 East, Salt Lake City, Utah 84111 before the above hearing panel. (R.79) [Appendix Av-3-1 to 2].

The notice says nothing about a trial on the merits of the formal complaint. In fact, the notice says nothing about the purpose of the hearing or the subject matter to be discussed. Thus, this notice is constitutionally defective, because it failed to apprise petitioner of the pending matter. See *Aetna Insurance Company v. Hartshorn, supra.*, 477 F.2d 97. Because the Notice was invalid as a notice for a hearing on the merits of the formal complaint as well as a notice for a sanctions

hearing, the March 2, 1992 hearing was void.

(c) **The Utah Supreme Court violated petitioner's due process rights by improperly expanding the scope of the appeal without notice to petitioner.**

The Utah Supreme Court's Opinion is based solely on the affirmance of the default judgment entered in March of 1991. (R. 24-27, and *In Re Schwenke, supra,* 865 P.2d at 1355.) [Appendix Ai-1 to 20]. However, the issue of the validity of such default judgment was not presented to the Utah Supreme Court for review.

Schwenke's Petition sought review of the "Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline," entered September 3, 1992. See *Notice of Appeal* dated October 2, 1992, (R. 142.) [Appendix Av-19-1 to 10]. The September 3, 1992 order was based solely on the default entered on July 31, 1992. Accordingly, if the July 31, 1992 default was void, it follows, a *fortiori* that the September 3, 1992 order was void. Therefore, Schwenke's focus

on the appeal was his challenge to the July 31, 1992 default. See *Notice of Appeal and Docketing Statement* [Appendix Av-19-1 to 26].

It is settled law in Utah that issues not involved in the specific judgment or order appealed from cannot be considered and determined on appeal. See, *Forbes v. Butler,* 275 P. 772, 774 (Utah 1928) [The Utah Supreme Court rejected the issue of accounting because no appeal was taken from that part of the trial court's judgment]. Therefore, absent a cross-appeal or cross-petition presenting other issues for review, the Court could address only those issues which were inherently a part of the September 3, 1992 Order, which was the subject of the appeal. See, *Terry v. Zions Co-op Mercantile Inst.,* 617 P.2d 700, 702 (Utah 1980) [If the appellee wishes to argue for alteration of the judgment to enlarge his rights, such as to revive a claim rejected by the court below, he must file a cross-appeal or cross-

petition.]

The Appellate Record and the applicable law clearly show that the only issues inherently included in a review of the September 3, 1992 Order were the following issues:

> 1) Was there a factual or legal basis to support the July 31, 1992 default?
>
> 2) Was Schwenke's motion to set aside the July 31, 1992 default impliedly denied by the September 3, 1992 order? If so, was the denial reversible error?
>
> 3) Could the Bar Commission adopt the Findings, Conclusions and Recommendation that had been recommended on April 20, 1992, and therefore, set aside by the June 8, 1992 Order granting petitioner's Motion for Reconsideration, without holding another sanctions hearing?

Because the dispositive issue analyzed and relied by the Utah Supreme Court was not within the scope of issues inherently included on the September 3, 1992 order, the decision of the Utah Supreme Court is void for lack of jurisdiction. *Forbes v. Butler,* 275 P. 772, 774

(Utah 1928); *Terry v. Zions Co-op Mercantile, Inst.*, 617 P.2d 700 (Utah 1980). Additionally, since the court expanded the scope of issues on appeal, at a minimum, due process considerations would require that petitioner be advised about reliance on the new issue so he could address it. Petitioner received no notice that the Utah Supreme Court was considering the issue of the validity of the December 4, 1990 service of process. Consequently, when petitioner prepared his appellate briefs he only addressed the issues within the scope of the appeal -- namely, whether the default judgment based upon the purported service of process of July 7, 1992, should be set aside. Furthermore, the default entered on the basis of the December 4, 1990 service of process was impliedly set aside by the June 8, 1992 Order granting the Motion for Reconsideration. Since the validity of the latter order was not placed before the Utah Supreme Court by Schwenke's appeal or by a

cross-appeal by the Bar, the Utah Supreme Court lacked jurisdiction to re-open said issue, *sua sponte*. *Id.*

(d) **The Bar Commission and Bar Counsel violated petitioner's due process rights when petitioner was caused to be served with a summons and original formal complaint on July 7, 1992, without leave of court.**

The Findings and Order Granting Respondent's Motion for Reconsideration was signed on June 8, 1992, but was not mailed to Schwenke until June 16, 1992. (S.R. 23). [Appendix Av-11-9]. Adding 3 days under URCP and 10 days pursuant to the Order granting petitioner's motion for rehearing, Schwenke's Answer was not due until June 29, 1992. See, *Rule 6(e), URCP* [Appendix Av-22-10] and *Order granting Motion for Reconsideration*, [Appendix Av-11-1]

Bar Rule XI(c)[Appendix Av-22-1 to 2] provides that an answer to the formal complaint "may raise such defenses and motions as are permitted under the Utah Rules of Civil Procedure." *Rule XI(c).* Under Rule 12(b)

URCP [Appendix Av-22-12 to 14], a defendant may serve a motion alleging the insufficiency of process or service of process, in lieu of filing an answer. *URCP Rule 12(b).* If such a motion is filed in lieu of an answer, the time for filing the answer is tolled until ten (10) days after the court enters an order denying such motion. *URCP Rule 12(a)* [Appendix Av-22-11 to 12].

In this case, Schwenke filed a timely motion to quash service, under URCP 12(b)(4) or (5). Accordingly, Schwenke had a legal right to file his answer within ten (10) days after receiving notice that the Order denying his Motion to Quash was entered. The Order denying his Motion to Quash was not entered until August 10, 1992 and was served by mail on August 12, 1992. (R. 137) [Appendix Av-16-1 to 3]. Adding three days for mailing and 10 days under the rule, Schwenke's answer was not due until August 25, 1992. *Rule 12(a), URCP.* Therefore, Schwenke's answer, filed on August 5,

1992, was timely filed by 20 days. Because Schwenke's answer was timely filed, there was no basis whatsoever for the entry of the July 31, 1992 default judgment. Accordingly, the setting aside of such default was mandatory as a matter of law.

The entry of the July 31, 1992 default was also violative of due process on another ground. Rule 4(b), URCP requires Bar Counsel to obtain leave of the Bar Commission to allow service of a summons and complaint more than 120 days after the filing of the complaint. [Appendix Av-21-2 to 3]. It is undisputed that the original complaint was filed on December 4, 1990, more than nineteen (19) months prior to the attempted service. Therefore, Bar Counsel was required to obtain leave of court prior to serving petitioner on July 7, 1992. Bar Counsel did not do so. Accordingly, Bar Counsel once again circumvented the procedural rules at the expense of petitioner's right to due process.

Clearly, without leave to allow service on July 7, 1992, the service was per se invalid because Bar Counsel did not have any legal right to effect service out of time.

(e) **The Bar Commission and Bar Counsel violated petitioner's due process rights when the Motion for Reconsideration was held without a transcribable record on May 28, 1992.**

Under Utah Law, a transcribable record of formal administrative proceedings are required to be kept at the agency's expense. *Utah Code Annotated (UCA) §63-46b - 8(1)(g); Bar Rule XII(b).* The purpose behind this due process requirement is to facilitate meaningful appellate review of the hearing proceedings.

In this case, the hearing on Petitioner's Motion for Reconsideration on May 28, 1992, was not recorded. Thereafter, petitioner requested that the written order be amended, because it did not conform with what occurred at the hearing. Because the hearing had not been recorded; a meaningful review by the Bar

Commission or the Utah Supreme Court was impossible. To add insult to injury, when the matter heard by the Bar Commission at the May 28, 1992 hearing was put at issue, the Utah Supreme Court looked to an extra-judicial affidavit of James Davis, submitted to the Utah Supreme Court, November 13, 1992 almost six weeks after the appeal was filed. In that affidavit, Mr. Davis self-servingly confirmed that what Bar Counsel had stated in the Order granting petitioner's motion to reconsider was what actually happened at the hearing. *Davis affidavit.* [Appendix Av-26-1 to 6].

The failure to keep a record of the hearing in this case, looks, feels and smells like a conspiracy. The Utah Supreme Court in essence has said: Bar Commission do not keep a record; so, if we want to affirm your findings of disbarment, we can just take your word for what happened. Isn't this type of one-sided, unfair adjudication what constitutional due process is

supposed to guard against?

(f) **The Bar Commission and Bar Counsel violated petitioner's due process rights by failing to follow rule 4-504, Utah Code of Judicial Administration in connection with the preparation and execution of the Order granting petitioner's motion for reconsideration and by participating in *ex parte* contacts concerning that order, in violation of Bar Rule XII(i).**

Procedure rules are intended to protect individuals due process rights. Accordingly, procedure rules are to be strictly complied with to ensure that due process rights are protected. See *cases cited, supra* at pp. 17-19. Usually, where the procedure rule is constitutional, a showing by the state that the rule was strictly complied with is sufficient to satisfy constitutional due process mandates. *Id.* Bar counsel and Bar Commission in this case did not even attempt to comply with the governing rules setting forth the procedure for adopting and entering a written order following a hearing. Such procedure is set out in Rule 4-504, Utah Code of Judicial Administration. [Appendix Av-22-14 to 15].

The rule contemplates that the winner at a hearing would be the better person to draft the order because he knew what he wanted and the legal basis for court's decision in his favor. This rule prevents the loser from attempting to better his position by placing extraneous, irrelevant findings into the order. However, the losing party also has an opportunity to object to inaccurate factual findings or inaccurate legal basis asserted by the winner. If the dispute persist, the court will hear the dispute and rule on the dispute before entering the final order. The rule clearly provides all parties with due process.

In this case, the Bar Commission instructed the losing party to draft the order after making its ruling. Then, the Bar Commission signed the order before the petitioner (winner) had a chance to look at the draft and object. As a result, petitioner was denied his right to an accurate and conforming Order. The outcome was a

clearly erroneous, inconsistent order, that also contained a false statement implying that petitioner lied to the Bar Commission (as discussed *supra* at pp. 9-10).

Rule XII(i) [Appendix Av-22-9 to 10] of the Bar Rules prohibits *ex parte* contacts between Bar Counsel and the Bar Commission to avoid improper influence by Bar Counsel of the Bar Commission's functions, especially since both entities are housed in the same building but also because *ex parte* contacts are violative of due process.

> It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendation to the decision maker. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it. *Sullivan v. Department of Navy,* 720 F.2d 1266 (1983) citing *Vitarelli v. Seaton,* 359 U.S. 535, 79 S. Ct. 968, 3L.Ed.2d 1012.

Mr. Davis in his extra-judicial affidavit admits that he had *ex parte* contact with Bar Counsel in preparing the

order that Mr. Davis signed and entered concerning petitioner's Motion for Reconsideration. See *Davis affidavit,* para. 9. [Appendix Av-26-5]. One can only imagine what Mr. Davis and Bar Counsel discussed at said meeting. One thing is for sure - they did not discuss complying with the applicable rules. Mr. Davis' willingness to twist and bend the rules and to illegally submit his extra-judicial affidavit to the Utah Supreme Court on behalf of the Bar tends to indicate that the *ex parte* discussion could not have been favorable to petitioner.

(g) **The Bar Commission and Bar Counsel violated petitioner's due process rights by deliberately and surreptitiously planting extra-judicial evidence in the official record of this case.**

How can one defend against fraud? It is virtually impossible. It is even more indefensible when the fraud is perpetrated by the government who is charged with enforcing the law and preventing fraud. All the due

process in the world would not protect any citizen, if those charged with enforcing the law chose to attain the desired result by any fraudulent means available, including breaking the law. The fraud on the Utah Supreme Court and petitioner in this case is a violation beyond constitutional magnitude and should not need further due process analysis.

There is one aspect of the fraud perpetrated against petitioner by Bar Counsel that should be addressed, however. The Utah Supreme Court shirked its duty and responsibility in this case regarding extra-judicial materials placed in the appellate record. Utah law mandates that the appellate record contain only those original papers and exhibits properly filed in the trial court prior to the appeal, and that augmentation of the record is allowed only to correct an omission or exclusion related to those original papers, but not to introduce new material into the record. *Olson v. Park-*

*Craig-Olson, Inc.*, 815 P.2d 1356 (Utah App. 1991). The Affidavit of Stephen A. Trost was newly manufactured evidence, which was illegally planted in the record. Although, the Utah Supreme Court may be excused for relying on the Stephen Trost affidavit, because of the deceptive manner in which it was submitted to the court, the James Davis affidavit was out in the open for the court to see, and Bar Counsel even referred to it as extra-judicial. There was no excuse for the Utah Supreme Court to rely on the Davis Affidavit, in arriving at its decision.

**(3) THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A RULING OF THE UTAH SUPREME COURT THAT CLEARLY DISCRIMINATES AGAINST PETITIONER ON ACCOUNT OF HIS RACE.**

The Utah Supreme Court concluded from the allegations of the extra-judicial affidavit of James Davis that petitioner withdrew his claim of racial discrimination. *In Re Schwenke, supra,* 865 P.2d at

1352. [Appendix Ai-8]. The Utah Supreme Court neglected to ask petitioner at any time during the proceeding whether or not he wished to pursue this claim. Petitioner raised that issue beginning with the hearing of March 2, 1992, and he will continue to assert the issue until it has been properly redressed.

The threshold question in equal protection analysis is whether or not unequal treatment exists. *Matter of Randall*, 640 F.2d 898, 903 (8th Cir. 1981); *Attorney Grievance Commission v. Kerpelman*, 438 A.2d 501, 508 (Md. App. 1981). It is undisputed that Bruce J. Udall is a Caucasian and petitioner is a racial minority. Petitioner and Bruce J. Udall were law partners at the time of the events charged in the formal complaint. Bruce Udall was charged with a similar formal complaint arising under the same facts as the petitioner's case. Yet, Bar Counsel stipulated to a settlement wherein Bruce Udall was only placed under probation, while Bar

Counsel sought and obtained sanction of disbarment against petitioner based on the questionable default. Accordingly, the petitioner has met the threshold question of unequal treatment by Bar Counsel, Bar Commission and the Utah Supreme Court.

It is worth noting that the record in this case shows clear and deliberate actions by Bar Counsel and the Bar Commission to bring about petitioner's disbarment. This includes bending and twisting the procedural rules at every turn, manufacturing evidence, illegally planting evidence in the official court file, and manipulating the content of the official court file. Although, petitioner raised the issue of the file not being prepared pursuant to the rules, he was ignored by the Utah Supreme Court who thereby acquiesced in the violations of his due process rights perpetrated by Bar Counsel and Bar Commission. See *Appellate Brief of Petitioner*, pp. 7-8 [Appendix Av-24-9 to 14].

Bar Counsel's and Bar Commission's conduct in this case can only lead to one conclusion, that those entities intentionally discriminated against petitioner. The Utah Supreme Court is not without blemish, either. It has been the Utah Supreme Court's standing policy to strike briefs that do not cite to the record. *State v. Price,* 827 P.2d 247, 249 (Utah App. 1992); *Trees v. Lewis,* 738 P.2d 612, 612-613 (Utah 1987); *Uckerman v. Lincoln Nat'l Life Ins. co.,* 588 P.2d 142, 144 (Utah 1978). Yet, when petitioner pointed out that same violation by Bar Counsel, the Utah Supreme Court denied the motion. [Appendix Av-25-8]. Bar Counsel was given an opportunity to conform it's brief to the rule, but failed to do so. In the end, Bar Counsel prevailed because the Utah Supreme Court's adopted most of the unsubstantiated and illegal factual allegations asserted by Bar Counsel with no citation to the record or the citations were to the illegally planted

evidence.

## CONCLUSION

This case is fraught with constitutional violations of petitioner's due process and equal protection rights. Those due process violations ranged from a simple failure to follow a procedural rule to criminal fraud upon the court and petitioner. These due process violations resulted in a disbarment of petitioner, based solely on an illegal, illegitimate entry of default on July 31, 1992. Furthermore, because, petitioner is a racial minority and member of a protected class, and his former Caucasian law partner charged with the same claims, received unequal sanctions, the threshold for an equal protection claim has been met. Accordingly, the petition for a writ of certiorari should be granted to prevent the gross miscarriage of justice that has been perpetrated against petitioner.

DATED this 20th day of June, 1994.

A. Paul Schwenke
Petitioner Pro Se
10 West Broadway, #311-B
Salt Lake City, UT 84101
Telephone:(801) 359-0600
Telefax:(801) 359-1859

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Aii- Order Affirming Findings, Conclusions and Recommendation. This is the order that was appealed to the Utah Supreme Court. (9/3/92)

Aiii- Order denying Motion for Rehearing. (1/18/94)

Aiv- None


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Av-2- Defaults certificates (5/28/91) and (5/19/91)

Av-3- Notice of hearing set for March 2, 1992. (12/06/91)

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In Re A. PAUL SCHWENKE
No. 920480

SUPREME COURT OF UTAH
December 1, 1993
Rehearing Denied Jan. 18, 1994
Cited as 865 P.2d 1350 (Utah 1993)

Disciplinary proceeding was brought against attorney. On attorney's appeal from Board of Bar Commissioners' recommendation of disbarment, the Supreme Court,

Hall, C.J., held that:

(1) attorney was properly served, and

(2) misappropriation of client funds warrants disbarment.

Disbarred.

1. Appeal and Error Key No. 1010.1(8.1)

Process Key No. 53

Whether person has been served with process is question of fact, and trial court's determination will be affirmed so long as it is supported by substantial evidence.

2. Appeal and Error Key No. 842(1)

Whether person was properly served is question of law, which was reviewed, without deference, for correctness.

3. Attorney and Client Key No. 48

Attorney was properly served in disciplinary proceeding where summons and formal complaint were sent to attorney's last known address, after bar counsel received assurance from person who formerly subleased that space to attorney that all mail sent to address would be forwarded to attorney, whose whereabouts were otherwise unknown to bar; attorney was aware of pending proceedings, and attorney was in fact afforded full-scale hearing on merits of allegations against him. State Bar Rule XI(b).

4. Constitutional Law Key No. 287.2(5)

In disbarment proceedings, adherence to minimum due process requirements includes notice of hearing. U.S.C.A. Const. Amend. 14.

5. Attorney and Client Key No. 58

Misappropriation of client funds warrants disbarment and order of restitution.

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A. Paul Schwenke, pro se.

Wendell K. Smith, Salt Lake City, for the Bar.

HALL, Chief Justice:

A. Paul Schwenke appeals an order of the Board of Bar Commissioners ("the Board") affirming a hearing panel's findings of fact, conclusions of law, and recommendation of discipline that included a recommendation that Schwenke be disbarred and pay restitution in the amount of $97,250. We affirm.

In 1985, Schwenke represented Caren Serr in a personal action. In 1987, Serr and her husband Ron Serr filed a complaint with the Office of Bar Counsel ("the Bar") alleging that Schwenke had violated the Rules of professional Conduct by misappropriating approximately $100,000. in the course of settling Serr's personal injury case. The matter was then held in abeyance pending outcome in civil litigation between the parties. On September 19, 1989, the parties entered into a stipulation in the third district court in which Schwenke agreed to a $100,000 judgment

against him based on fraud, not dischargeable in bankruptcy.

On December 4, 1990, a summons and formal complaint that incorporated by reference the September 1989 stipulation were issued. Schwenke's actual whereabouts were unknown to the Bar. The Bar investigated and determined that if the summons and formal complaint were mailed to Schwenke's address shown on the official roster of attorneys, it was unlikely that Schwenke would receive them. Consequently, the summons and formal complaint were served upon Schwenke by certified mail directed to the office where Schwenke was known to have been practicing law. Before the summons and formal complaint were mailed, however, Bar counsel Stephen A. Trost met with Jamis M. Johnson, an attorney who subleased office space to Schwenke at the same time. Johnson assured Trost that all mail sent by the Bar to Johnson's office space

(the same address where Schwenke had been practicing) would be forwarded to Schwenke. Accordingly, the summons and formal complaint were mailed to this address.

It appears that sometime in the middle of January 1991. Schwenke left the state and did not provide the Bar with his new address. While Schwenke's whereabouts were unknown to the Bar between the time the summons and formal complaint were served and the time he left in mid-January, Johnson claimed that Schwenke remained in contact with his office. On January 11, 1991, a notice of intent to default was sent by certified mail to the address where Schwenke had conducted his law practice. On March 5, 19991, a request for entry of default was submitted to the executive director of the Bar, and on March 19, 1991, default was entered against Schwenke.

On March 28, 1991, the Bar mailed a request for

a sanction hearing to the office where Schwenke had been practicing law. On May 24, 1991, notice of a sanctions hearing set for July 22, 1991, was mailed to the same address. On December 6, 1991, notice of the sanctions hearing reset for March 2, 1992, was sent by certified mail. this time to Schwenke's last known address as shown on Bar roster. In addition, a copy of the notice of hearing was sent to a Las Vegas Nevada, residence.

Between the time the notice of hearing was sent and the date of the hearing, Schwenke did not answer the complaint. On March 2, 1992, the sanctions hearing was held. Schwenke appeared at the hearing, admitting that he learned of the sanctions hearing on approximately February 6, 1992, and that he knew of the sanctions hearing from the notice that had been sent to the Las Vegas address. Even though default had been entered against Schwenke, the merits of the

complaint were addressed. The Bar called witnesses and introduced documentary evidence establishing the facts and violations charged in the formal complaint. Schwenke cross-examined witnesses and testified in his own behalf. At the conclusion of the hearing, the panel entered findings of fact, conclusions of law, and a recommendation that Schwenke be disbarred. The panel further recommended that he make restitution to Serr in the amount of $97,250.[1]

On May 4, 1992, the Board approved by order the hearing panel's findings, conclusions, and recommendations of discipline. On May 19, 1992, Schwenke moved for reconsideration of the order. He contended that he was not properly served with the

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1. The hearing panel found that pursuant to the $100.00 stipulated judgment entered by third district court. Schwenke had paid $250 and conveyed a Duchesne County property valued at 2,500. to Serr, leaving a balance of $97,250.

summons and formal complaint and that the only pleading he received was the notice of hearing for March 2, 1992. He sought an order requiring "adequate and proper" service of the summons and formal complaint. He asserted that the hearing panel's findings, conclusion, and recommendation of discipline were racially motivated. The Board granted a hearing on Schwenke's motion for reconsideration.[2]

At the May 28, 1992, hearing on Schwenke's motion for reconsideration, Schwenke withdrew his contention that the hearing panel's action was racially motivated. After considering all the facts and circumstances, the Board concluded that the hearing panel had appropriately found that Schwenke was

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2. We note that on May 19, 1992, Schwenke had in an affidavit that his address on the official Bar roster was P.O. Box 57853, Murray, Utah 84107, the same address to which the notice resetting the sanctions hearing was sent.

properly served with summons and formal complaint. In addition, the Board concluded that Schwenke had been afforded a fair hearing on the merits of the complaint in that he appeared a the hearing, confronted the witnesses against him, examined the evidence, and presented matters in his own defense. Notwithstanding, the Board granted Schwenke's motion for reconsideration and afforded him the opportunity to file an answer, after which the hearing panel would reconvene and consider any additional matters presented by the parties. Accordingly, the Board ordered Schwenke to file an answer to the complaint. Instead of filing an answer, however, he filed an objection to the Board granting his motion for reconsideration, arguing that despite the Board's findings, he had not been properly served and therefore could not be ordered to file an answer.

On July 7, 1992, the Bar caused Schwenke to be

personally served with summons and formal complaint. He again failed to file a responsive pleading, and on July 31, 1992, default was again entered against him. On August 5, 1992, nine days after the prescribed time had expired, Schwenke filed an answer to the July 7, 1992, summons and formal complaint. He contended that he thought he had hand-delivered a copy of the answer along with some other documents relating to another matter to the Bar on July 17, 1992. Later, he learned that instead of putting a copy of the answer in the envelope with the other documents, he had "inadvertently" placed it in his file. As a result, the answer was not filed within the prescribed in the summons. He claims that when he learned of the mistake, he filed a late answer even though default had been entered against him.

On August 10, 1992, the Board considered and denied Schwenke's objection to their earlier order on

the ground that the objection was rendered moot by personal service of the July 7, 1992, summons and formal complaint.[3] On August 10, 1992, the Bar filed a motion with the Board to affirm the hearing panel's findings, conclusions, and recommendation of discipline entered following the March 2, 1992, sanctions hearing. On August 11, 1992, Schwenke moved to set aside the default certificate pertaining to the default entered July 31, 1992. The Bar responded, opposing Schwenke's motion, the Board entered an order on September 3, 1992, affirming the hearing panel's

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3. The order was drafted before the entry of default on July 31, 1992. At the time, it was presumed that Schwenke would file an answer to July 7, 1992, summons and formal complaint. As a result, the order provides that Schwenke's objections could be presented to the hearing panel when it met to reconsider his case. Because Schwenke never filed an answer to the July 7, 1992, summons and formal complaint, default was entered. Portions of the order which mention a later hearing were no longer applicable.

findings of fact, conclusions of law, and recommendation of discipline, which included the recommendation that Schwenke be disbarred.

Schwenke appeals, arguing that the default entered against him for failing to answer the July 7, 1992, summons and formal complaint within the time prescribed in the summons and resulting order affirming the hearing panel's findings of fact, conclusions of law and recommendation of discipline should both be set aside. He asserts that his default was due to mistake, that it is fundamentally unfair and reversible error for the Board to ignore his motion to set aside the default certificate, and it was unfair for the Board to enter a default certificate before ruling on his objection to the order granting his motion for reconsideration.

We begin by addressing a threshold matter. At the time of oral argument, Schwenke appeared pro se and objected to this court's use of the stipulation that

he and Serr entered into in the third district court. Schwenke contended that the stipulation, by which he agreed to a $100,000 judgment against him based on fraud and nondischargeable in bankruptcy, was merely oral and was not part of the district court record. After examining the record, we conclude that Schwenke was less than candid with this court. The record in this proceeding contains two copies of the stipulation and order that were part of the record in this proceeding before the district court. A review of the transcript of the March 2, 1992 sanctions hearing reveals that two copies of the stipulation and order were placed in evidence at the hearing, one, a certified copy of the stipulation and order prepared by Serr's counsel after the parties agreed to the terms of stipulation, was subsequently signed by Judge A. Rokich; the other. a copy of the same stipulation and order, bear's Schwenke's signature and contains minor

modifications.[4]

We now turn to the merits. While Schwenke raises the issues relating to the default entered against him for failure to answer the July 7, 1992, formal complaint within the time prescribed in the summons, we conclude that whether Schwenke was properly served with the December 4, 1990, summons and formal complaint is the dispositive issue.[5]

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4. Apparently, after Schwenke received a copy of the stipulation and order prepared by Serr's counsel, he did not feel that the stipulation accurately represented the parties' oral agreement entered into in open court. As a result, he made a few minor modifications and signed the stipulation.

5. Schwenke contends that because he argued in his motion for reconsideration that the had not received the summons and formal complaint and because the Board subsequently granted his motion, the issue of whether he was properly served with the December 4, 1990, summons and complaint was adjudicated in his favor. Schwenke is mistaken. The Board concluded that the hearing panel had found that he was properly served. Furthermore, it is clear that the

[1,2] We begin our analysis by stating the applicable standard of review. This case presents a mixed question of law and fact. Whether a person has been served with process is a question of fact.[6] Whether a person is properly served, however, is a question of law.[7] We will sustain factual findings by the hearing panel so long as they are supported by substantial evidence.[8] We afford no deference to conclusions of law but review them for correctness.[9]

[3] Rule XI(b) of the Procedures of Discipline of

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Board granted Schwenke's motion solely to allow him an opportunity to file an answer and present the merits of his position.

6. Reed v Reed. 806 P 2d 1182, 1184 n. 3 (Utah 1991) (citing Carnes v Carnes. 668 P 2d 555, 557 (Utah 1983)

7. Id

8. In re Discipline of Schwenke. 849 P 2d 573, 576 (Utah 1993)

9. Reed. 806 P 2d at 1184-1185

the Utah State Bar provides, "Service shall be made personally upon the attorney in question or by registered or certified mail to the last known address as shown by the official roster of attorneys of the Bar." At the time of service, Schwenke's whereabouts were unknown to the Bar, thereby precluding personal service. The Bar investigated and determined that if the summons and formal complaint were mailed to Schwenke's last known address as shown by the official roster of attorneys of the Bar, in strict compliance with the rule it was unlikely that Schwenke would receive them. The Bar then served the summons and formal complaint on Schwenke by certified mail at the office of Jamis M. Johnson. This was the office where Schwenke had been practicing law and was his last known actual address. Prior to serving the summons and formal complaint, Bar received assurance from Johnson that all mail sent by

the Bar to Johnson's office would be forwarded to Schwenke.

On January 11, 1991, a notice of intent to default was sent by certified mail to Johnson's office under the same agreement that it would be forwarded to Schwenke. Evidence suggests that Schwenke remained in the state until mid-January 1991 and that up until the time he remained in contact with Johnson's office. Additional evidence indicates that Schwenke was aware of the action taken by the Bar in the present matter and that he requested that Johnson watch for correspondence from the Bar. Notwithstanding, Schwenke failed to respond to the summons and formal complaint. Thereafter, a request for entry of default was mailed and default was sent certified mail under the same arrangements with Johnson. Schwenke still failed to respond.

We have observed that under the more stringent

requirements of service of process under Utah Rule of Civil Procedure 4, it is not required that a plaintiff exhaust all possibilities as a means of finding and serving a defendant, only that the plaintiff exercise reasonable diligence in good faith.[10] The Bar has met this requirement.

[4] We have also previously determined that in disbarment proceedings, adherence to minimum due process requirement includes notice of a hearing.[11] On December 6, 1991, a notice of hearing set for March 2, 1992, was sent by certified mail to Schwenke's address as shown on the official roster of attorneys of the Bar and to the Las Vegas address. Schwenke appeared at the sanctions hearing and admitted that he received notice of the hearing February 6, 1992, at the Las

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10. Downey State Bank v Major-Blakeney Corp. 545 P 2d 507, 509 (Utah 1976)

11. Schwenke, 849 at 576.

Vegas residence. Between the time Schwenke received the notice of hearing and the date of the hearing, he neither contacted the Bar nor filed an answer to the formal complaint. At the sanctions hearing, Schwenke cross-examined witnesses called by the Bar and testified in his defense as to the charges set forth in the formal complaint. We accordingly conclude that Schwenke was properly served with the summons and formal complaint on December 4, 1990, and that all subsequent documents were also properly served, thereby affording adequate notice and opportunity to respond to the charges leveled against him. Although Schwenke was in fact in default, he was nevertheless afforded a full-scale hearing on the merits of the allegations against him.

We have duly considered Schwenke's other arguments and find them to be without merit.

[5] The order of disbarment and the payment of

restitution is affirmed.

HOWE, A.C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR
Disciplinary Hearing Panel:
Robert Wallace, Chair
E. Gregg Tobler
Sandra Wilkins

| | |
|---|---|
| In the Matter of the Complaint by | ORDER AFFIRMING FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDATION DISCIPLINE |
| CAREN SERR against | |
| | F-322 |
| A. PAUL SCHWENKE<br>DOB: 10-12-51<br>ADM: 05-09-83 | |

Pursuant to Rule XII(e) of the Procedures of Discipline, the Board has reviewed the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Disciplinary Hearing Panel. It hereby affirms those determinations, adopts them as its own, and incorporates them by reference into this order.

Dated this 3rd day of September, 1992.

BOARD OF BAR COMMISSIONERS-

By

_____

Randy L. Dryer
President

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order in the matter of F-322 was mailed to A. Paul Schwenke, Attorney at Law at 106 Magic Dr., Murray, Ut 84107 on this 9 day of September, 1992.

_____

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

January 18, 1994

OFFICE OF THE CLERK

Paul H. Johnson
JOHNSON & LAWRENCE, P.C.
Attorneys at Law
10 West Broadway, Suite 311
Salt Lake City, UT 84101

In re: A. Paul Schwenke,
No. 920480 F-322

THIS DAY, Petition for Rehearing having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that a rehearing be, and the same is, denied.

Geoffrey J. Butler

Clerk

There is no judgment that would come under catagory #iv.

Supreme Court, U.S.
FILED

(2)

932089 APR 18 1994

No. _____ OFFICE OF THE CLERK

**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1993

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A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO
THE UTAH SUPREME COURT.

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# PETITION FOR A WRIT OF CERTIORARI

---

A. PAUL SCHWENKE, Pro Se
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Salt Lake City, UT. 84101
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Petitioner

**VOLUME TWO**

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No._____

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**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1993

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A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO
THE UTAH SUPREME COURT.

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**PETITION FOR A WRIT OF CERTIORARI**

---

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Petitioner

**VOLUME TWO**

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BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of the Complaint by
CAREN SERR
against

SUMMONS

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

THE UTAH STATE BAR TO: A. Paul Schwenke

You are hereby cited to appear and file an Answer in writing within twenty days after service of this Summons upon you, asserting your defense to the Complaint in the above entitled action, a copy of which is attached and served herewith. If the service of the Summons and attached Complaint is by mail, you actually have twenty-three (23) days from the date of the mailing of the Summons and Complaint to have your Answer postmarked or personally filed with John C. Baldwin at the Bar Office.

If you fail to answer within the time fixed by this Summons, the Commission will enter your default, deem the allegations admitted, and proceed to fix the time and date for a hearing to receive evidence and argument with respect to the discipline, if any, to be imposed or recommended.

DATED this 4 day of December, 1990.

| | |
|---|---|
| Stephen en A. Trost<br>Bar Counsel | Dale Kimbal , Chair<br>Ethics and Discipline<br>Committee |

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of
the Complaint by
CAREN SERR
against

FORMAL COMPLAINT

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

COMES NOW the Ethics and Discipline Committee of the Utah State Bar, by and

through Stephen A. Trost, Bar Counsel, and complains against Respondent as follows:

I

(Parties)

The attorney charged with unprofessional conduct in this complaint is A. Paul Schwenke, who is an Attorney and Counselor in the State of Utah, and a member of the Utah State Bar, residing in Salt Lake City, Salt Lake County, State of Utah, and whose address according to the records of the Executive Director of the Utah State Bar, is 165 South West Temple, Suite 300, Salt Lake City, Utah 84111.

II

(Jurisdiction)

1. This complaint is filed with the Board of Commissioners of the Utah State Bar by the undersigned as Chairman of the

regularly appointed Ethics and Discipline Committee of the Utah State Bar.

2. On or about February 19, 1988, before the Screening Panel of the Ethics and Discipline Committee of the Utah State Bar, a Notice of Complaint was duly served on Respondent.

3. On or about March 24, 1988, a Screening Panel of the Ethics and Discipline Committee of the Utah State Bar convened to consider this matter and at that time voted to issue a Formal Complaint.

III

(Statement of Claims)

(DR. Violations)

The unprofessional conduct charged in this complaint is alleged as follows:

4. Respondent has violated the following Rules of Professional Conduct as approved by the Utah Supreme Court on 2/19/71:

A) Canon 1, DR 1-102 MISCONDUCT

A) A Lawyer shall not:

3) Engage in illegal conduct involving moral turpitude; and/or

4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and/or

6) Engage in any other conduct that adversely reflects on his fitness to practice law.

B) Canon 1, DR 9-102 Preserving Identity of Funds and Property of Client:

B) A lawyer shall:

(1) promptly notify a client of the receipt of his funds, securities, or other properties and/or

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practical and/or

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of a lawyer and render appropriate accounts to his client regarding them and/or

(4) Promptly pay or delivery to the client as requested by a client, the funds, securities, or other properties in the possession of a lawyer which a client is entitled to receive.

IV

(Allegations of Facts)

The allegations of fact upon which the before mentioned disciplinary rule violations are based are as follows:

5. At all times herein the Respondent Schwenke was an attorney licensed to practice law in the State of Utah.

6. In June, 1985, the Respondent, and his associate Bruce J. Udall, entered into a contract with the Complainant, Caren Serr, to represent her in the recovery of damages for injuries she sustained in an automobile accident on November 16, 1983. The contract provided that the Respondent and his associate were entitled to an attorney fee of 28% of any recovery.

7. The subject accident involved two cars colliding at an intersection, one driven by a party named Collard and insured by Western Fire, and the other driven by a party named Whitehead and insured by Colonial Penn. Total policy limits were $200,000. It appeared that both Collard and Whitehead were at fault in the original collision and that the Complainant was without fault in that subsequent to the initial collision their vehicles struck her vehicle.

8. On September 23, 1985, Schwenke settled the Complainant's claim against Whitehead and Collard. In negotiating the settlement, advising her to accept the settlement, and collecting and disbursing

settlement proceeds the Respondent Schwenke was the lead attorney,
taking all steps and making all representations necessary to effectuate the settlement, with his associate Bruce J. Udall being more or less passive.

9. Respondent advised the Complainant that the most he could obtain for her was a $26,763.75 cash payment with which he would purchase from an insurance company an annuity that would provide her with a $250 a month payment for her life. The defendants' insurers would also pay her outstanding medical bills of $11,179.96 and her attorney fees.

10. Complainant reasonably relied on the advice given her by Schwenke and

accepted this offer and signed the settlement documents.

11. Documents submitted in the Third District Court indicate that both insurers were going to pay their entire limits, totaling $200,000 due to the severe disabling injuries incurred by the plaintiff, complainant herein, and the clarity of her liability claim against both defendants.

12. On or about September 23, 1985, Complainant endorsed a check issued by Western Fire for $27,847.88, as well as a second check also from Western Fire for an additional $13,381.88. The Respondent advised her that these checks represented the monies to purchase the annuity and to pay the balance due on her medical bills.

13. Respondent never purchased the annuity, but rather converted the funds for his own use.

14. Over the next two years, Schwenke sporadically paid Complainant from his own monies a sum of $250 a month for a total of $4,500 representing to the Complainant that he was in fact forwarding to her the insurance annuity checks.

15. The Complainant has no annuity and has been irreparably harmed thereby.

16. Complainant relied on Schwenke's statements that he would obtain the annuity when the settlement was made and that he had obtained the annuity.

17. On or about September 25, 1985, Colonial Penn delivered two checks to defendant Schwenke for the identical sums

that Western Fire issued, to wit, $27,847.88 and a separate check for $13,381.88. Schwenke failed to advise Complainant about these funds.

18. Schwenke deposited the checks into his own account in his own name and either forged or caused to have forged Complainant's signature on both checks.

19. The actual money that Complainant received from the settlement was the $4,500 paid to her under the pretense of an annuity over a two-year period, and $11,310 in cash at the time of settlement, for a total of $15,810.

20. Total cash paid by the insurers was $82,359.52. In addition, the insurers paid Complainant's medical expenses of $11,179.96; for a total benefit to

Complainant, if properly disbursed, of $93,539.48.

21. The maximum fee Respondent and his associate Udall would had been entitled to was $26,191.05.

22. Respondent Schwenke actually received $65,049.52.

23. In a Stipulation of September 19, 1989, entered in the Third District Court case of Serr vs. Schwenke and Bruce Udall, Civil No. 88-01441, Schwenke confessed to a judgment in fraud, not dischargeable in bankruptcy in the sum of $100,000, less credits for cash Respondent paid her after September 19, 1989, and the proceeds from two parcels of land, one in Weber County, Utah, and the other in Duchesne County, Utah which according to the terms of the

Stipulation were to be deeded to the Complainant.

24. Subsequent to the Stipulation, Schwenke paid $250 in cash, did not convey the Weber County property, but did convey the Duchesne County property valued at $2,500.

25. The Stipulation provided that the findings of this judgment were to state fraud with particularity for the purpose of avoiding a bankruptcy discharge of the judgment by Schwenke.

26. At the time Schwenke settled Complainant's case, he was in bankruptcy.

27. Complainant's then known medical costs, including major reconstructive surgery, was $40,000 to $60,000. By settling when he did, defendant Schwenke made

unavailable to plaintiff the money to have that surgery and, as a result, she has not had the surgery and remains disabled.

28. Schwenke timed the receipt of the settlement funds to meet his own financial needs at the expense of his client.

29. The fee Schwenke actually took is roughly equivalent to the fee he would have obtained had he obtained for plaintiff the full $200,000 settlement, the difference being that plaintiff received over $100,000 less that she would have had Schwenke given her interests priority over his own.

30. The $100,000 stipulated judgment entered by the Third District Court in Serr vs. Schwenke and Udall, was based upon fraud including clearly justified damages for the loss of the money necessary for Serr to have

the needed rehabilitative surgery, and for money converted by Respondent and paid by the insurers for the loss of her future earnings, emotional distress, punitive damages, costs and attorneys' fees.

WHEREFORE, the undersigned, on behalf of the UTAH STATE BAR, prays that proceedings be taken herein against the attorney charged pursuant to the Procedures of Discipline and the Revised Rules of Professional Conduct of the Utah State Bar, and that the Utah State Bar be awarded its costs in bringing this action and that the appropriate restitution orders be made.

DATED this 4 day of December, 1990.

_____

Dale A. Kimball, Chair
Ethics and Discipline
Committee

_____

Steph en A. Trost
Bar Counsel

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Formal Complaint and Summons was deposited in the U.S. mail postage prepaid certified mail, to A. Paul Schwenke, Attorney at Law, at 165 South West Temple, Suite 300, Salt Lake City, Utah 84111 on this 4 day of December, 1990.

_____

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the Complaint by
CAREN SERR

DEFAULT

against

F-322

A. PAUL SCHWENKE
DOB: 12-12-51
ADM: 05-09-83

The Respondent having been regularly served with process, and having failed to appear and answer the Formal Complaint on file in the above-captioned matter, and the time allowed by the Procedures of Discipline of the Utah State Bar and the Summons for answering having expired, the default of the Respondent is hereby entered, upon the request of the Office of Bar Counsel.

DATED this 19 day of March, 1991.

JOHN C. BALDWIN
Executive Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Default was mailed certified mail, postal certification number P753 115 861 to A. Paul Schwenke at 165 S. West Temple, Suite 300, SLC, UT 84101 on this 19th day of March, 1991.

---

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the Complaint by
CAREN SERR. DEFAULT
against

F-322

A. PAUL SCHWENKE
DOB: 12-12-51
ADM: 05-09-83

The Respondent having been regularly served with process, and having failed to appear and answer the Formal Complaint on file in the above-captioned matter, and the

time allowed by the Procedures of Discipline of the Utah State Bar and the Summons for answering having expired, the default of the Respondent is hereby entered, upon the request of the Office of Bar Counsel.

DATED this 28 day of March, 1991.

John C. Baldwin
Executive Director

CERTIFICATE OF CERTIFIED MAILING

I HEREBY CERTIFY that a true and correct copy o the foregoing Default was mailed certified mail, postal certification number P753 115 908 to A. Paul Schwenke at 165 S. West Temple, Suite 300, SLC, UT 84101 on this 25 day of March, 1991.

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR
HEARING PANEL:
Robert Wallace, Chair
Richard Makeoff
Sandra Wilkins

In the Matter of the
Complaint by:

NOTICE OF HEARING

BAR COUNSEL AND RON
AND CAREN SERR

F-322 AND F-478
(CONSOLIDATED)

against
A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83
TO: A. PAUL SCHWENKE

Notice is hereby given that a hearing in the above-entitled matter will be heard Monday, March 2, 1992 at 9:00 a.m. in the Utah State Bar Offices, 645 South 200 East, Salt Lake City, Utah 84111 before the above-named hearing panel.

DATED this 6 day of December, 1991.

_____

CERTIFICATE OF MAILING

I hereby certify that a true and current copy of the foregoing Notice of Hearing, was mailed certified mail, return receipt requested, number P 753 115, 659, to A. Paul Schwenke, Attorney at Law, at P. O. 57853, Murray, Utah 84107 and certified mail, return receipt requested, number P 753 115 659 to A. Paul Schwenke, Attorney at Law 5233 Holbook Drive, Las Vegas, Nevada 89103 on this 6 day of December, 1991.

_____

STATE BAR ASSOCIATION

IN RE:

A. PAUL SCHWENKE

BE IT REMEMBERED that on the 2nd day of March ! 1992, the above-entitled matter came on for hearing before Robert Wallace, Greg Tobler and Sandra Wilkins, sitting as the hearing panel in the above-entitled matter for the purpose of this cause, and that the following proceedings were had.

A P P E A R A N C E S

For the State Bar: MR. WENDELL SMITH
Assistant Bar Counsel

MS. PAMELA BLEVINS
Paralegal

For the Respondant: MR. A. PAUL SCHWENKE

ROCK MOUNTAIN REPORTERS
322 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone (801) 531-0256

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P R O C E E D I N G S

MR. WALLACE: I think we're ready to proceed. I have--this is the complaint of Ron and Karyn Sur or Karyn Sur, Bar No. F-322, consolidated by order of 6 November 25th, 1991, with a second complaint, that of the Bar Council concerning primarily actions involving Stanley L. Wade.

Is that everyone's understanding?

MR. SMITH: Yeah. We have--we have two matters that have been consolidated here; we have 322 involving Karyn Sur and 478 involving Stanley Wade, yes, sir.

MR. WALLACE: Correct. F-478.

Would the parties please state their appearances?

MR.SMITH: Wendall Smith, Assistant Bar Council, and seated with me at the table is Pamela Levins, a paralegal in the Office of Bar Council.

MR. SCHWENKE: I'm Paul Schwenke, I'm the

MR. WALLACE: Respondent.

MR. SCHWENKE: Respondent

MR. WALLACE: Mr. Schwenke, do you have any objection to proceeding at this time, or any reason why we shouldn't go forward at this time?

Mr. SCHWENKE: I do have objection to these proceedings, which I would ask for--

- 02 -

MR. WALLACE: Would you like to state that for 2 the record at this time?

MR. SCHWENKE: Well, it will take some time for me to put it on the record, if it's that appropriate.

MR. WALLACE: I think now is the time to do it. We'll give you that lea~e, if you'd like to proceed at this time.

MR. SCHWENKE: All right. Thank you.

If I may--

MR. WALLACE: Well, before you proceed, let me just indicate that the panel is composed of Greg Tobler, to my left, Sandra Wilkins to my right, and myself, Robert Wallace. That should probably be a matter of record.

Go ahead, Mr. Schwenke.

MR. SCHENKE: Thank you.

If I may--might, by way of background put two facts on the record. Chronologically, as of August, 1990, the last appearance I have before the panel here on a motion for discovery, sanctions for failure to comply with discovery.

The panel, again, it's not this panel, the panel in that matter ordered my pleadings stricken and imposed a one-year suspension; this was August, 1990.

After that time, in or about September, with the impending year suspension, I start looking elsewhere for perhaps other possibilities of earning or making a living.



At this time, in August, I was subletting an office space from a Mr. James Johnson at 165 South West Temple, here in Salt Lake City,

and soon after the decision of the panel in that other case, I left that office and started to pursue some other sources of earning a living, however, when I left that office, my ex-wife stayed in the office to do bookkeeping work for Mr. James Johnson, and she stayed in that office until January, 1991, wherein--

MR. WALLACE: What is her name?

MR. SCHWENKE: Wilma Schwenke; wherein she left the State with her boyfriend and my children, to Las Vegas, Nevada.

What I was working on at the time was the possibility to develop some properties, real properties I have back in the Samoan Islands, and around December or so, I, with the Samoan Embassy in Washington, New York, there was a possibility that perhaps I could

go forward with some possibility in that respect.

So in January of 1991, I left the State. First, I went to Vegas and spent a few days with my children and then from Las Vegas, I went on to New York and Washington, D.C. to work with the embassy there, the Ambassador from Samoa to the United States on the prospect of developing these properties back in Samoa.

From--in February of 1991, the Ambassador and I

went to Samoa and we worked on this project there. We returned. I again returned back to Washington, D.C. I again left the--made three more trips to Samoa on this project; in the meantime, my residence has clearly been in Washington, D.C. working on this project.

Starting in, some time in March, 1991, Robin Moffat, who is the secretary to Mr. James Johnson, collect start collecting mails that come to the office there that are addressed to myself or to Wilma Schwenke, and when she has enough mail, she will put them all in a big envelope and send them off to Wilma, at her boyfriend's address in Las Vegas, Nevada.

Before I left for Las Vegas in January, I inquired with the Supreme Court on the

status of the order wherein I was suspended for 90 days. That was entered, or the order that was a result of a hearing in August. So, January, six months or so later, I asked the Supreme Court, and the order has not been rescinded to the Supreme Court, and I was--I wanted to file an appeal of that order, so I asked Mr. Johnson before I left, if he could keep tabs on it to make sure that when the order is entered, let me know so I can return and file an appeal on that order.

Additionally, I also asked Mr. Johnson to see if he could keep in touch with the Bar on any other proceedings that are--are proceeding here and advise me so I can properly

respond. According to Mr. Johnson--and Mr. Johnson and his secretary offered to make themselves available this morning in the event that the panel wishes to corroborate that statement, that they will be able to come here and do so. Mr. Johnson said he--he did in fact contact the Bar and advise them to contact him if any proceedings were-- or on any matter. That didn't happen.

I believe from looking at the matter, it appears like any of the notices that were supposed to be sent, that were sent to me direct, went to the office of James Johnson. And may I add that his office, the receptionist is not his receptionist, it's a shared receptionist amongst several businesses in the building, and whether the

matter or the pleadings got served on that receptionist or ended up with- I don't know how, I'm just speculating that perhaps it got to her, if in fact, there is a return of mail service or anything to that nature, I don't even know who the receptionist would have been in March or April or May or June of 1991, or July, 1991, or neither was there any express, implied authority for anybody in that receptionist desk to receive any--accept any service on my behalf. Specifically, I asked Mr. Johnson to find--to keep tabs on the Keaton matter that was on appeal, that I wanted to appeal, there has not been an appeal yet, and the order, at the time I left the State, has not been filed with the

Supreme Court. Incidentally, the order was filed in--with the Supreme Court in March, seven months after the hearing in August, and that notice of that order again fell in the wayside with all other notices that have allegedly been sent in this matter.

And secondly, I also asked Mr. Johnson on the Sur matter, which is one of the matters before the Court today, before the panel today, and also another matter, the Kafen matter; I had no idea there was a Wade matter pending; none whatsoever, and according, I did not tell Mr. Johnson to--to keep an eye out on the--a Wade matter, 'cause there was no--no--no idea that that was so.

And my advice to hi~ was simply to let me know, find--to stay on top, I didn't want to be outside of the State and--and things are happening, which unfortunately, it did happen without me here to properly defend against any of these matters.

According to Mr. Johnson, he made the contact with the Bar and--and asked to be advised of those matters; instead, it looks like the Bar continued to serve me and address matters to me and sent to Mr. Johnson's address or at least in the building that he's in.

Again, I want to emphasize, I do not know who the receptionist at that building was in March, 1991, June, 1991, or July, 1991, when the alleged service was made

on the matters before the panel this morning. Let me again go back to when I said in February, I traveled with the Ambassador to Samoa. We spent a lot of time there on this project. Then February, 1991, and October, 1991, a total of four trips was made between D.C., Washington, D.C. and--and Western Samoa.

On the--my May trip to Samoa, 1991, I had several investors from Idaho, from Florida, that traveled with me and the Ambassador to Western Samoa. While in Samoa, I--we I ran into a person from Provo, Utah, his name was Dan Wakefield. Mr. Wakefield, when he returned from Samoa in June of 1991, contacted the Bar to inquire about my person, or about what, you know, whether--if I was to be, I guess, trusted

with the project that was going on. Mr. Wake field has a different project he was trying to pursue in Samoa, a museum, Robert Lewis Stephenson museum in Samoa, and he felt that perhaps my project was going to interfere with his, and accordingly, he wanted to find out from the Bar what my status was.

When he contacted the Bar office, he was informed that, number one, I was disbarred number two, that I have stolen thousands--hundreds of thousands of dollars from clients in Utah; and number three, that I was presently a fugitive from justice. This information was then relayed to the investors that went with me to Samoa and eventually

came--got to me on around the first part of Feb--or July, I discovered that in fact there was this type of information being given out.

Also, I was concerned about this fugitive from justice matter, so I then contacted Mr. Johnson here and asked him to check with the prosecutor's office and see if there's any pending matter there against me. When Mr. Johnson contacted the prosecutor's office, he discovered that number one, the Bar office has instituted a criminal complaint against me, and that there has been a warrant for my arrest issued.

At that time, I then asked Mr. Johnson to advise the County prosecutor that I was coming in--giving a date and time that I

would be coming in to the State to surrender to the Court, and this was again, like I say, it was in the latter part of June or the first part of July of 1991.

I might mention at this point that, and I asked for the rules this morning, Rule 9, Sub (2)(3) of the rules for the proceedings before this panel, or before the Bar, clearly states that matters, if matters are pending before the Committee or the Bar has any relation to any civil or criminal matters factually similar to criminal or civil matter, that the matters before the Bar will be held in abeyance.

Contrary to the spirit of that rule, it appears

that the Bar, at the same time they instituted criminal proceedings against me, they also filed matter 478 that is before the panel this morning to proceed also against me here before the Bar Commission at the same time they have instituted criminal proceedings against me, which I believe is totally in contravention of this--of its own rules. Or at least the spirit of the rule.

It appears that in--Mr. Johnson had an agreement with the prosecutor that I will then, and this was again in July, appeared and surrender; but in or about October--September, I was in Samoa in September and again working on this project, I returned October, 1991. At this time, I was traveling with the Prime Minister from Samoa to go back to D.C., he--the Prime ~iinister

was scheduled to meet with President Bush, but also I was expecting the Prime Minister to meet with the orsanization called OPIC, Overseas Private Investment Corporation, who had the funding that was in place already for a project--for a project in Samoa, which funding is what I was hoping to then use in developing my properties in Samoa.

Interestingly, this was in October, 1991. In D.C., I was excluded from all the functions, receptions and the Prime Minister asked me to go to New York and wait for the Prime Minister in New York. In New York, the Ambassador sat me down and advised me that twice, at least twice,



Somebody from the Bar has called the Embassy in New York I mean in--in Washington D.C.,

and again advised the Embassy in D.C. that Schwenke was disbarred, Schwenke has stolen several hundred thousands of dollars from his clients in Ameri--in Salt Lake--in Utah, and that Schwenke was a fugitive from justice.

And as a consequence of all these, the Ambassador felt that the government, and he so advised the Prime Minister, should not get involved with my project. This was in October, 1991. And with the--that news, I left Washington in October, and I went to Idaho, where I have been staying. Except in December, 1991, I went to Las Vegas again to visit my children. And I acguired the Christmas tree and was in their house putting on the Christmas decorations when

the Las Vegas Police arrested me and I spent two-and-a-half days in a holding tank in Las Vegas, pursuant to this criminal matter pending here.

It turned out that the agreement between the prosecutor and Mr. Johnson just never got in to the Court and the warrant was still outstanding, and after I was released, I immediately came to the State and appeared before the Judge and surrendered to the Court, and I'm now under--the criminal prosecution has now proceeded against me and I'm here in the State for that purpose, and also for purposes of any more proceedings before the Bar, I will

remain here as long as it will take to resolve both criminal matt--any matters before the Bar. And if I may give the panel my address now, in Salt Lake City. It's 106 logic Drive, that's M-a-g-i-c, Magic Drive, Murray, 84107-8209.

MR. WALLACE: Anything else concerning that matter right now?

MR. SCHENKE: Yes, your Honor. I--I 'm not through.

MR. WALLACE: Go ahead.

MR. SCHWENKE: Okay. I think I might mention that the--the Bar certainly know what effect Of personal service entails. Before I could sit down on Friday before Judge Moffat for my arraignment, the bailiff asked me to step outside, and she served me with the pleadings on a different matter. I

believe the Bar has indicated that this is clearly how personal service would be done in--in these matters.

Secondly, this pleadings I was served with on Friday, I can honestly say to this panel, is the only pleading that has been served on me since I left the State in January Of 1991.

MR. WALLACE: What is that pleading?

MR. SCHWENKE: It's a pleading on another-- prepared in another complaint-



MR. WALLACE: Is it either one of these? All I want to ask is-

MR. SCHWENKE: No.

MR. WALLACE: --is it either one of these? F-322 or F-478?

MR. SCHWENKE: No.

MR. WALLACE: All right. Go ahead.

MR. SCHWENKE: Okay. It appears to me that due process requires or at least demand that I be personally served on the matters now before the panel. I was not.

Bar Office was aware, at least by June, 1991, that I was in Samoa for when they were contacted by Mr. Dan Wake field. Definitely, the Bar appears to know that I was in D.C., 'cause they made the calls to the Embassy in D.C. and according to the Ambassador, was July and August of 1991, so if there--you know, I think if there was--if--if-- I think that that information available to the Bar, that I think there's at least some effort, if they know that I'm there, that there be at least some efforts, but nothing was

ever sent to me at the Embassy in D.C.; even though I was not part of the Embassy, it's very likely that the Ambassador, since I was working directly with him and I was staying at his house most of the time until I got an apartment, would--would give me the--a pleading, or at least mail, if I mail was--was served there.

13

In--let me--let me state that I believe I do have a defense against these two matters. On the F-322, the Sur matter, I was arrested and prosecuted, went through the whole gamut; a jury unanimously exonerated me from all of the charges. Even though the burden is different there than

it is here, I believe at the very minimum, it says that maybe I do have something to say, maybe I do have a defense.

As to matter 478, and I know with God's help, I will also be exonerated on that matter; but it's pending.

It's pending before--I mean it's a criminal matter pending. The facts are identical to the facts of this complaint, and I think that the spirit of this rule for all discoverance (?) proceedings here demand that at least that matter should be held in abeyance until the criminal matter has been disposed of or resolved.

Coming here this morning, I'm convinced that this panel has the power, you have the power, I believe, to correct the errors that

have been made in both matters pending here, that's been presented to you, and I respectfully request that the two matters be set aside, the two defaults be set aside, and give me the opportunity to defend against these serious charges. And these charges are extremely serious; the only thing you can give is disbanment from practice of law, and in the--the nature that's been so serious, I ask for the opportunity to defend



myself. And with that, I wish to commit to the panel, I am going to be here for the criminal prosecution; I never wanted to avoid any responsibilities there and I never wanted to avoid any responsibilities here. So, I commit to this panel that I will stay

in this State until after the- until the criminal prosecution is complete and then go through all the matters pending before the Bar, until every single one of those have been resolved before I leave the State again.

Thank you.

MR. WALLACE: All right. Let me ask you a few questions just so I can clarify a few things. Before you finished practicing in the State, or temporarily finished practicing in the State, was 165 South ~est Temple, the address at which you were located for-

MR. SCHWENKE: Yes.

MR. WALLACE: --your practice?

MR. SCHWENKE: That's correct.

MR. WALLACE: After you quit practicing, did you at any time notify the Bar of specific whereabouts, such as either in Samoa, D.C., New York, Idaho, anywhere such as that, given them some new address by which they could notify you?

24 MR. SCHWENKE: No, I did not. I didn't personally do that.

15

MR. WALLACE: Have you seen the affidavit of Jam--Jamis M. Johnson in this case?

MR. SCHWENKE: No.

MR. WALLACE: All right. In this affidavit, and I'll be happy to have you look at it, give you an opportunity to look at it, it indicates in Paragraph 4, I

have opened his, being your, mail, at his request since approximately January 15th, 1991, and I opened the notice of the Bar in the captioned matter, and the captioned matter is the Sur matter, F-322.

Did Mr, Johnson ever send to you that notice?

MR. SCHWENKE: No.

MR. WALLACE: Did he ever talk to you about that notice and indicate to you that he had received a notice concerning the Sur matter?

MR. SCHWENKE: No.

MR. WALLACE: In any of these conversations that you had with Mr. Johnson after January 15th, 1991, which you've told us about where you consulted with him on

pending criminal charges and other matters, did he ever give you an indication that there was a notice outstanding or matters outstanding, complaints from the Bar Association concerning the Sur matter or the Wade matter?

MR. SCHWENKE: Well, he--he did not specifically say anything like that. In fact, the only conversations we



had were the criminal matter, 'cause that was the only sort of pressing thing.

MR. WALLACE: Now, I notice that you're here today; what notice did you have of this hearing and when did you receive that notice?

MR. SCHWENKE: When I appeared in my--the roll call hearing in February before

Judge Hutchings, I appeared with Mr. Johnson, and--and then he so advised me.

MR. WALLACE: And you're telling this panel that as of, what day was that in February?

MR. SCHWENKE: Probably February 6th or so.

MR. WALLACE: about February 6th. And are you telling this panel that that was the first time that Mr. Johnson indicated to you that there was anything pending before the Bar concerning the Sur matter or the Wade matter

MR. SCHWENKE: That was the only time he advised me that there was something pending, but it was not- nothing in particular with the Sur or Wade matter. He

just said what, you know, there is a sanction hearing, I believe some time in March, and then later, he-

MR. WALLACE: Well, when did he tell you that?

MR. SCHWENKE: This was at the time I was here last. It was--was February, around February 6th or so.

MR. WALLACE: February 6th of this year?

MR. SCHWENKE: That's correct.

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MR WALLACE: When you went to visit your wife, at the time that you were arrested, did she give you any of the mail that had been forwarded to her with respect to you personally?

MR. SCHWENKE: I have gotten the mail, but not at that time. I have since gotten the mail, after I returned from Utah, after my roll call appearance before Judge Hutchings, I went back to Las Vegas and collected a lot of the mails that were sent to her.

MR. WALLACE: Let me see if--and that was in December?

MR. SCHWENKE: No. That was here in February.

MR. WALLACE: In February. February, I--you're right.

As I see it, you basically have three positions concerning your objections to going forward I one is that you were not personally served, is that correct?

MR. SCHWENKE: That's correct.

MR. WALLACE: The second is that you received no actual notice of the complaints against you until February 6th of 1991, is that correct?

I'm talking about notice from either a person orally telling you that there was something pending or from actually seeing a complaint or a document concerning the Sur matter or the Wade matter, F-322 or F-478.

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MR. SCHWENKE: I saw a complaint now on the Sur matter, and that was in February, after February 6th, after I did appear and I retrieved the box with the mails that were sent to Wilma in Las Vegas.

MR. WALLACE: But that's one of your arguments, that you didn't have sufficient notice and only first learned of the matters

in February of 198--'92; is that your point?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: I'm just trying to articulate your arguments here.

MR- SCHWENKE: Yes, sir.

MR- WALLACE: All right. Now, the third one I see is that under Rule 9(2)(3), a criminal matter is pending concerning the Wade matter, and you feel it's inappropriate for the Bar to proceed with that matter pending; is that another point that you're making?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Have I--have I correctly characterized the three points that you've tried to make?

No personal service, no notice and criminal matter pending, is that--

MR. SCHWENKE: That's correct.

MR. WALLACE: Are those your arguments?

MR. SCHWENKE: Yes, sir.



MR. WALLACE: Do you have any other argum this time?

MR. SCHWENKE: No.

MR. WALLACE: All right.

Mr. Smith, would you like to respond? No, wait. Excuse me. Do any of the panel members have any questions?

MR. TOBLER: Yes. I just have one question as a follow-up to what Mr. Wallace asked you.

Did you pay Mr. Johnson anything to look after you matters for you in your absence?

MR. SCHWENKE: No.

MR. TOBLER: It was just a request; Mr. Johnson was not representing you or your practice in these matters?

MR. SCHWENKE: No, that's correct. He was not attorney, more for a friend type of request. He appeared on my behalf in the criminal matter, but without any compensation.

MR. WALLACE: Well, and as far as you know, Mr. Johnson, Jamis Johnson, didn't ever notify the Bar that he was representing you as an attorney and would accept service on your behalf?

MR. SCHWENKE: I asked Mr. Johnson this

morning if he'd ever done that, based on what I asked him to ask the--to follow-up on the matters pending before the



Bar, and he said no. He said he did not represent that he was his--my attorney, and--and I never intended him to be my attorney. I wanted to at least get some notice of what as pending, and that was the purpose of his effort.

MR. WALLACE: Mr. Smith?

MR. SMITH: Well, the respondent is obviously mistaken about the rules regarding personal service. Rule XI(b) of the procedures of Discipline of the Utah State Bar points out that--it says Bar Council shall cause to be served upon the attorney in question a copy of the formal committee

complaint and summons. Let's see, I lost my place the latter of which shall require the attorney to appear and answer said formal complaint within 20 days after service, and it says, service shall be made personally upon the attorney in question or by registered or certified mail to the last known address of the official roster of the attorneys of the Bar.

And I submit that the record will--will speak for itself, that the last address which the respondent ever gave the Bar was 165 South West Temple, Suite 300, Salt Lake City, Utah, and the record will show that certified mail was sent to that address on each occasion, and that it did not come back unclaimed or returned. And the respondent has admitted that he has not kept

the Bar informed of his address, that he's gone all over the world, all over the



country and has never bothered to keep the Utah State Bar informed of his address, Knowing full well that there was conduct here in Utah that would be a--the subject matter of disciplinary action by the Utah State Bar. And knowingthat, he has--he has not and I submit intentionally not informed the Bar as to where he's been--where his where abouthave been, and the Utah State Bar, therefore, is entitled to rely upon the rules, and the rules say that we can--we can obtain service by--by mail to his last known address, that's what has occurred.

And as a matter of this hearing today, this was sent, as you'll notice, to--to an

address in Las Vegas, Nevada. Your records should indicate that it does not, it was not returned, that it was accepted at that address, and so I submit that the respondent has not been 'ully candid this this hearing panel, that he was fully aware that actions were pending against him, and--and that heintentionally, I submit, declined to keep the Bar informed of his whereabouts, for the very purpose of avoiding service of process. And the Bar should not have to chase him all over the country to do this.

And we have served him at the address thlt he provided us, and the only address that he provided us, we, on our own, we have located other addresses, which we have served him at, tried to serve him at, even though thev were

not officially registered with the Bar We've tried to accommodate him, we've tried to find him, and--and but when an individual takes it upon himself to become a fugitive and--and to run and hide from the Bar, the Bar shouldn't have to be penalized because of his refusal to keep the Bar informed of his whereabouts.

And the record speaks for itself, as far as the documents you have in the official file which show that we have obtained service in accordance with the rules, that the summons and complaint were served in accordance with therules, that defaults have been entered in accordance with the ~}es, and I submit that we should be able to go forward now on the hearing, on the purpose of having

a sanctions hearing, because defaults have been entered in both of these cases, and the only issue before this pane~ now is the appropriate sanctions to be entered against this responsdent.

MR. WALLACE: Your reply, Mr. Schwenke.

MR. SCHWENKE: No.

MR. WALLACE: Oh, do--does the panel have any questions of Mr. Smith?

MR. SCHWENKE: No. No further reply.

MR. WALLACE: You'd submit the matter?

MR. SCHWENKE: Yes.

MR. WALLACE: I suggest that we take a very brief



recess so the panel can discuss the matter, and I think we need to rule on this before we proceed any farther, and we'l ask

everyone to step out if they would, please.

MR. SMITH: Yeah. Yeah, may I just make one other comment?

MR. WALLACE: Yes.

MR. SMITH: I failed to mention, he made an allegation about the Bar calling him in--in Washington, D.C. and of course, I have no knowledge of that. I--I can unequivocally represent that nobody from the Office of the Bar Council called him there, and until he mentioned it a few minutes ago, I had no knowledge he was ever there.

And one other thing about the Rule 9 requirement that the matter be held in abeyance pending a criminal case. You'll notice that the language in that rule is permissive. It says that they may be held in abeyance, it doesn't say that they must be

held in abeyance.

MR. WALLACE: All right. Thank you. If we could have everyone step out for a moment.

(Off the record.)

MR. WALLACE: Mr. Schwenke, let me indicate that we~ve completed some deliberations and we've come to a unanimous decisions. Let me address some items one at a time, I'm certainly not goins to mention all of the things that might be possible grounds for our decision; but let me

mention just a few.

Concerning the criminal procedure pending, that is Rule 9(e), it says the continuance of a complaint, disciplinary proceedings may, and it is not in the affirm a tive, that it must, may be held in abeyance by the Committee We looked up the definition of the word committee and the committee is either the Ethics and Disciplinary Committee of the Bar or a panel thereof, and we constitute a panel thereof, prior to filing of a formal committee complaint, so we may have--hold matters in abeyance prior to the filing of a formal complaint, and we're beyond that stage now, a complaint has been filed.

Then it says, or by the Board, at any

stage of the proceedings. It appears to us that the Board probably has power, which by definition under Rule 3(b) is the Board of Commissioners of the Utah State Bar, that's the Board.

So, it appears to us that the Committee as defined, has the authority prior to the filing of a formal complaint to decide to defer, and after the filing of a formal complaint, the Board at any stage may de.er matters.

So, we don't know, one, if we have the power to defer matters at this time. Secondly,it's permissive and the Committee has decided to so ahead, so we are not going to grant any motion to continue or motion to not proceed

based on that at this time.

Secondly, concerning the lack of notice and the lack of personal service, the Bar of Disciplinary Rule does indicate that service may be at--by registered mail at the last known address; whether or not that provides due process is another question, but that's the rule and we

operate under the rule. And so we feel that your address was at the time, 165 South West Temple, that registered mail was sent there and that was the last known address. We think in a sense that that's sufficient under Rule 11(b).

However, in addition, it appears that you at least had some indication that there may be matters pending before the Bar. You talked to Mr.' Johnson about those matters

several months prior to this hearing date, you felt that there may be matters pending before the Bar, and in that sense, perhaps you had an obli~ ion. outlast at that point to follow through, notify the Bar of an address, or perhaps, even call yourself, and find out, Are matters pending? What is pending? I need to ~now the status of everything, rather than just wandering if matters are pending, or wondering if Mr. Johnson is representing your interests well, or wondering if the Bar might be able to find an address by which to serve you.

In addition, at least by February 6th, you were aware of these matters pending and matters pending, and we



feel that it would have been appropriate

immediately to try to bring some type of motion before the Bar, take some type of action, rather than waiting until now when there are, I'm assuming, I may be incorrect, but I'm assuming that there are witnesses here, I've seen you, Mr. Smith, talking to some people in the foyer and I assume that there are-

MR. SMITH: That's correct, sir.

MR. WALLACE: There are witnesses here?

MR. SMITH: Yes, sir.

MR. WALLACE: And first raising this matter whenthe witnesses are here and people have been inconvenienced. We feel it would have been appropriate to object timely; that would be at or about February 6th, 1992, so with those comments, and not precluding other reasons why we might have taken action, we

intend to go forward at this time.

Does any panel member have any other comments they'd like to make? All right

Is there any--are there any other preliminary matters, Mr. Schwenke, that you'r like to bring up before we turn the time over to Bar Conical on their side of the case?

MR. SCHWEKE: No.

MR. WALLACE: Mr. Smith?



MR. SMITH: Just like to clarify then that we are going on the assumption that the service was had, that the order--that the order entering the default has been properly entered?

MR. WALLACE: Yes.

MR. SMITH: So we're now at the sanctions portion of the hearing?

MR. WALLACE: Yes.

I might indicate to Mr. Schwenke, however, that the Board talked about those matters and we know the effect of the default, but in considering an appropriate sanction, we feel that evidence of whatever occurred, any evidence you might have that was presented at your trial, for example, in the Sur matter, anything you might have which would show that there was not any improper motive on your part or whatever else, we won't preclude you from putting on. If there is some indication of reasons, anything, doing with reasons why certain sanctions should or should not be entertained or why we should not entertain any sanctions against you, we will certainly listen to those

Is that correct? Am I misstating that?

MR. ROBLER: Yeah. One other comment, too, that you raised Rule 9 and we explained to you our Interpretation of that, but you certainly have the right to piscine the Board should you continue to feel that that particular



matter ought to be held in abeyance. The Board apparently has the right to--to--to do that. We feel that we do not have that authority under the rules. So, you--you--I--just so that you have knowledge of how you might proceed.

MR. SCHWENKE: Thank you. Could I respond to that?

I--given these two points that have been made, that I can at this hearing present evidence, that--I thought the sanctions

hearing is just merely taking what they have on default as admitted fact and issued as sanction and--and must be mistaken with that. And secondly, given that I think if--if the right is to the Board, I would like to appeal to--or have the opportunity to be able to pursue that right with the Board to, either to hold matters in

abeyance, so again, maybe, not necessarily renew our motion but ask that maybe matters be held at least to give me a chance to go to the Board and see if the Board will hold matters in abeyance pendins the criminal matter.

MR. WALLACE: Well, we--we do, and because the witnesses are here, and the hearing was set, we do intend to proceed at this time with the taking of whatever

evidence the ~ar intends to put on at this time.

After that is finished, we may discuss again what we should do with respect to that, whether we should make a decision or a determination right now, we did not



discuss that, and I don't want to, you know, say what we would do without discussing it with the full members of the panel, so we will do that at some time

Let me just indicate concerning the first point you made, that this was the time set for sanctions, but of course, even though certain aspects of the complaint are deemed admitted, there may well be several tames of explanation of why certain things were done, even though it's admitted for example, a

check was cashed, what happened to that check, what happened to the proceeds, what was done with it, may be of importance to us, and those, I would assume where it would be matters of mitigation and in detenmining sanctions, we want to hear matters concerning aggravation and matters concerning mitigation and we would expect that you would have been on notice that you at least could have provided that information, and we'll give you an opportunity to be personally heard on such matters today.

MR. SCHWENKE: And--okay. I thought--I guess what I'm asking them on the first issue, given that I do have--point to you that right to present that, if I mav be able to do that at a later day here again, 'cause there is a transcript of the criminal trial,

and there's a lot of evidence there that I know are mitigating evidence, and I was clear under the impression that the proper forum for me to bring my objection as to the due process and whatnot was



here, and apparently that's not the case, and so I ask if the Bar Council can put on their evidence, but I be permitted to, at least, for mitigation purposes or whatever purposes to bring, you know, set another time to do that.

MR. WALLACE: We will allow Bar Council to proceed at this time, we'll take your motion to allow you to put on contrary evidence under advisement. At the close of their case, we'll discuss that motion and

make a determination cf whether we will allow you to do that.

MR. SCHWENKE: A11 right. Thank yob.

MR. SMITH: And for the record, of course, we object to that. I again point to the fact that every indication we have indicates that the respondent is living in Las Vegas, Nevada, that this notice of this hearing was sent to him on the 6th of December, 1991; he's been on notice of this hearing now for two months, or three months, and I'd represent to the panel that he's never contacted me or the Office cf Bar Council about this proceeding or the nature thereof, or -that he should do. he's an attorney, he can read the rules, and I submit that this is nothing but a delaying tactic, and we enter our objection to any further

continuances.

And with that-

MR. WALLACE: All right. With that, you mayproceed, Mr. Smith-

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MR. SMITH: Thank you, sir.MR. WALLACE: --and call witnesses.

MR. SMITH: We just want to put some exhibits into evidence that really are already--already there. The formal complaint, we just Wanted to have everybody have a copy of the formal complaint.

MR. WALLACE: Do you have copies for Mr. Schwenke at this time?

MR. SMITH: I do. And although that's in the record and part of the official record, nonetheless, just for the sake of everybody having something to look at, we wanted to--to

have those marked and everyone have a copy.

So, this is original copy for the record, and like I say, it's already a part of the formal record, however, we wanted everyone to be able to have a copy for their own use, and so for that reason, I'm marking those.

MR. WALLACE: All right. I now have in my possession the formal complaint, F-322, marked for these proceedings as.Exhibit 1.

You've received a copy of that, Mr. Schwenke?

MR. SCHWENKE: Yes.

MR. WALLACE: Do you have an objection to our receiving Exhibit 1?

MR. SCHWENKE: No.

MR. WALLACE: All right. Now, I also have a

summons in the matter F-322, is this marked--it is not marked as an exhibit.

MR. SMITH: That should be actually a part of Exhibit 1. It just got separated.

MR. WALLACE: All right. This is the summons and will be a part of Exhibit 1.

Have you received a copy of that Mr. Schwenke?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Do you have an objection to our receivint the summons?

MR. SCHWENKE: No.

MR. WALLACE: All right.

MR. SMITH: And likewise, what we've had marked as Exhibit 2, the--a default, likewise is a part of the official record in the case. Once again, however, for the sake of everyone

being able to have a copy of the documents for their own use during the proceedings, we have marked these as Exhibit 2. I'd offer that.

MR. WALLACE: All right. I now have--the panel 10W has the default in the case F-322 marked as Exhibit 2.

Have you received a copy of that, or. Schwenke?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Do you have any objection to the Panel's receiving that in evidence?

MR. SCHWENKE: No, but may I state that, you know,



(inaudible - tape problems) objection to all these matters being properly served; right? That-

MR. WALLACE: Correct. Without walvin~ theprior objection to our going forward-

MR. SCHWENKE: Yes.

MR. WALLACE: --and without it, would you have any objection to this being received as evidence under the circumstances under which we're proceeding?

MR. SCHWENKE: No. No, sir.

MR. WALLACE: All right. The record should acknowledge that Mr. Schwenke is not waiving any of the objections he has made prior to the--concerning the entry of default.

MR. SMITH: All right. The next--we're going to omit Exhibit 3, so we can renumber this one Exhibit 3 if you'd like so we can have the record to be--we had an Exhibit 3, we--we've changed our mind and we're going to

withdraw that one, and are offering Exhibit 4 instead, and this is a certified copy of the Court records obtained in the case of Karyn Sur vs. A. Paul Schwenke and Bruce Udall in the District Court here in Salt Lake.

MR. WALLACE: We now-

MR. SMITH: We'd offer the certif ed copy, theclerk has a certified copy.

MR. WALLACE: The panel now has Exhibit 4 which is



a stipulation and order in Case No. 88-01441, Karyn--or Karyn, I'm not sure how you pronounce that, Sur, plaintiff, vs. A. Paul Schwenke and Bruce Udall, defendants, before Judge John A. Rakish.

Have you received- copy of that stipulation and order?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Do you have an objection to our receiving in evidence at this time?

MR. SCHWENKE: Yes, sir, I will have to object to that as improper evidence before this panel on the basis that this--it's terminated a stipulation, the stipulation has not been signed or--or agreed to, there could not be a stipulation.

The order of the Court, if it's signed, obviously I can't object to that I but as far as the stipulation, I will have to object to that because I did not stipulate to that.

MR. WALLACE: Mr. Smith?

MR. SMITH: This is a certified record, and I believe that the record Will show that this stipulation was read into evidence by the Judge; however, Mr. Clawing, counsel for

Miss -- Mrs. Sur, is present in the hearing room today and has just provided me with a -- with a Stipulation which I was not aware of, which indicates pursuant to the case, it has been changed somewhat, and has been signed by the respondent, so then we would-

MR. WALLACE: Do you want to withdraw Exhibit 4?

MR. SMITH: Well, we want to--at least we can stipulate--not all of it, but at least the stipulation and order were changed.

MR. WALLACE: Well, Exhibits 1 and 2 arereceived, Exhibit 4 is not received, subject to it being tied up. If--if you want to make copies of exhibit--that-

MR. SMITH: Yes. I'll just show this

one--show this one to the respondent, which purports to have his signature on it, and ask him if that bears his signature, the 's not a witness, but at least it does purport to bear his signature.

MR. SCHWENKE: I would still object, your Honor- I mean, the Honorable panel here, I don't recall the circumstances, the documents show, you know, but cross outs and whatnot, and I don't recall the circumstances wherein this was ever signed. The signature, I--it would appear to be my signature.

MR. WALLACE: Are you offering this as an exhibit?

MR. SMITH: Yes. I'll offer that as a--

MR. WALLACE: What number would that be?

MR. SMITH: It will be the next one in

order, it



would be 4.

MR. WALLACE: No. We have a 4.

MR. SMITH: Well, we're going to--we're going to renumber 4--

MS. WILKINS: They--they want to redo that one.

MR. SMITH: Beeause we withdrew our No. 3, so then ehange 4 to 3.

MR. WALLACE: All right. Let the record--let the reeord show that the stipulation and order whieh was previously mentioned as Exhibit 4 is now being remarked and 11 is Exhibit 3, and you're now going to mark as Exhibit 4,the dominate you've just been referring to, whieh was signed by Mr. Sehwenke?

MR. SMITH: Correet. And we ean-

MR. WALLACE: All right. That's not--that will not yet be reeeived over the objeetion of Mr. Sehwenke until it's tied up as to whether or not he actually entered into that stipulation and what the various cross outs mean and whether he agreed with the cross-outs or whatever.

So, we'll take the--

MR. SMITH: Right. Just so the reeord is clear, the stipulation and order that we have attached hereto previously as--as Exhibit 3 eontains doeuments other than



the stipulation and order, and for that reason, we would- we would like them both placed into evidence because the-the one that we

initially offered is a certified document and it contains the signature of the judge and the certified

MR. WALLACE: Okay. Let's--let's back up a little bit then.

MR. SMITH: So that we don't have-

MR. WALLACE: In Exhibit 3, Mr. Schwenke, there is a stipulation and order consisting of five pages, which appears to have the signature of John A. Rakish at the bottom. That's the first document; do you have any other objection to the receipt of that document other than what you've just stated, that it doesn't bear your signature and the other arguments that you made?

MR. SCHWENKE: That's correct.

MR. WALLACE: All right. ~ow, the next page is a minute entry I do you have any

objections to the panel receiving the minute entry?

If you need time to review that minute entry, take what time you need, Mr. Schwenke.

MR. SCHWENKE: No.

MR. WALLACE: All right.

MR. SCHWENKE: No objection to the minute entry.

MR. WALLACE: All right. That will be received, if we have to--if the other is not received, we'll break



that out and make it a separate exhibit.

The next document is a judgment in the same case, Civil No. 88-01441, appears to be executed by Judge John A. Rokich, and it appears to have the certificate of the clerk

of the Court; do you have an objection to the panel receiving the judgment?

And take what time you need to read the entire judgment, Mr. Schwenke. I'm not trying to hurry you.

MR. SCHWENKE: Yes. I would object to that 'cause this was judgment entered based on the stipulation which I wasn't in fully accordance--I mean, astipulation that I didn't agree with.

MR. WALLACE: All right. That will not be received unless it's further tied up, at this time.

MR. SMITH: All right, sir. At this time, we'll call Karyn Sur as a witness, and we're going to ask Mr. Sam King who is currently counsel for Karyn Sur in the civil matter pending, to interrogate that witness,

in as much as he's more familiar with the underlying facts of the case, and so, we'd call Karyn Sur, and Mr. King, would you do the honors, please?

MR. WALLACE: Mr. Schwenke and Mr. Smith, I--I have just read the judgment myself, and I don't know that the judgment is based on the stipulation. It says the Court having previously entered its findings of fact. I



think we will admit the judgment because it is a certified copy, an appropriate judgment, for whatever it states in there, that--for the purpose of showing that a judgment was entered against Mr. Schwenke, but I don't know that I can--we can read anything else out of that;

but we will accept the judgment.

MR. SMITH: All right, sir. I understand.

MR. WALLACE: But we will accept the judgment, so that--that has been received.

Would you please face the clerk and be sworn, Mrs. Sur?

KARYN SUR,

called as a witness by and on behalf of the Bar Council in this matter, after having been first duly sworn, was examined and testified as follows:

MR. SCHWENKE: Mr. Chairman?

MR. WALLACE: Yes?

MR. SCHWENKE: May I object to Mr. King partial pating in this matter on behalf of the Bar Council and on the basis there's no notice that Mr. King was going to be counsel

here as well.

MR. SMITH: Mr. King-

MR. SCHWENKE: For the-

MR. SMITH: --is not Bar Council, I've simply asked him, because he' s more familiar with the civil matter



and the matter involving Ms. Sur to--t ask the questions of her concerning the injuries and damages she suffered in the automobile accident and the problems she's had as a consequence of the actions giving rise to this complaint. He's not representing the;Bar Council; however, I would ask him to--ask him to--to interrogate his client for me.

MR. WALLACE: Your objection is noted, Mr. Schwenke. I think for purposes of just

moving this hearing along, that may expedite matters, and I don't know that Mr. King would get any other information out of the witness than Mr. Smith, and I don't think you're probably prejudiced in that regard, so I'm going to allow Mr. King to go ahead.

MR. KING: Thank you.

If I might, that edited stipulation that Mr. Schwenke signed, this was not entered by the Court as a stipulation because--

MR. WALLACE: I think we'd better be careful here.

I think we need to proceed by witness, and I think if you're going to make such representations--

MR. KING: Okay.

MR. WALLACE: --you should be--Mr.Smith

should call you as a witness and have you sworn, and then we'll get into that.

MR. KING: Fine. All right.



DIRECT EXAMINATION

BY MR. KING:

Q You're Karyn Sur, and you're the plaintiff in the civil action against Mr. Schwenke, 88-01441, Salt Lake County District Court?

A Yes.

Q Thank you. Now, did you ever know if Mr. Schwenke received a total of four checks before--some years after you contacted Attorney Jim Hawkes, who found that out?

A I--

MR. SCHWENKE: Objection. Leading.

MR. WALLACE: Did you or did you not?

THE WITNESS: I didn't know there was four checks until '87. I only knew of two.

Q (By Mr. King) Okay. Now, the second two checks; did you ever see or sign them?

A No.

Q At the time Mr. Schwenke was settling your case, that was in 1985, wasn't it?

A Yes.

Q And at that time, you had had surgery, in Utah, on your back?

A In Nevada.

Q In Nevada?

A Las Vegas.



Q And had been referred to a Dr.

Watkins in Los Angeles?

A Yes.

Q Before this subject accident, you'd had two other major back injuries?

A Yes.

Q And it appeared that you needed--

A (Inaudible)

Q --a major back operation, kind of from top to bottom; is that correct?

A My entire low back.

Q Uh huh (affirmative).

MR. SCHWENKE: Excuse me, Mr. Chairman. May I have a standing objection to Counsel leading the witness.

MR. WALLACE: Please try not to lead her.

MR. KING: I'll--yes.

Q (By Mr. King) Was Dr. Watkins

referred to you as being the specialist in reconstruction?

A Dr. Williams recommended him, my doctor in Vegas. He said that's the only specialist he used, and is the only one that handles problems back.

Q Okay. Okay. Now, at the same time your case was being settled by Mr. Schwenke, did you see Dr. Watkins in Los Angeles?

A Yes. I went down there for tests and to see if he

could help me or not.

Q And did you have an estimated cost of surgery,

something like $95,000?

A Yes. It was $5,000 for testing and $96,000 for the surgery.

Q Okay. Did you pay the $5,000 for testing?

A No. I couldn't afford it.

Q Okay. Because of what happened to the proceeds on your claim, have you ever had that operation?

A No. I have not.

Q And how old are you now?

A Forty-six.

Q Are you no receiving early total Social Security

disability?

A Yes.

Q Is that because of the injuries in this accident for which you haven't received the treatment you need?

A Yeah, 'cause I can't--can't have that surgery, because my back (inaudible) I can't work, I'm totally 20 disabled.

Q And through Social Security, have you tried to get this funding? Just yes or no.

A I've tried talking to them and they won't pay for it.

Q Too much moneys



A Yeah.

Q So for the last six years then, have you been disabled?

A Totally disabled on Social Security

and SSI, both.

Q And to your knowledge, was there enough money in the fund from the two defendants to have fully paid the surgery?

A Yes.

Q If we can do the--

MR. WALLACE: Enough money in the fund from what?

MR. KING: All right. Let me back up on that, your Honor.

Q (By Mr. King) There were two defendants who were jointly negligent, they collaborated with each other-- this is kind of--it's in the judgment, and their cars then both collided with yours, is that right?

A (Inaudible)

Q And both defendants had $100,000 in liability insurance?

A Right.

Q So there was $200,000 available for you?

A Yes.

Q And Mr. Schwenke's fee was 28 percent?

A If I recall, or--(inaudible)



Q So, if Mr. Schwenke had settled for $200,000, he would have had 56,000 as his 28 percent--A Yeah.

Q --and you would have had 144,000?

A Yeah. I would have paid my surgery and had some left over, in--in (inaudible)

Q What medications are you taking at the present time, Karyn?

A (Inaudible) Percoset, aroset, maclamin and (inaudible)

Q And are you having any deterioration or any problems in your right leg now?

A My right leg has atrophied a half an inch.

Q Are you capable of being physically active?

A No, not at all.

Q Before the accident, were you a long-line lady truck driver?

A Yes. I was a truck driver.

Q And the two accidents that you had before this accident; had you recovered to the point where you were going to go back to work?

A Yes. As a matter of fact, when I got hit, I was-- my son was behind us, I was taking it to the shop and then I was going to

my doctor, Dr. Horne, to get--I had my back fused, it had been six months, and (inaudible) all right



and It was specced out or me, so I could drive it I was trying to get the okay to drive, when I was sitting at the red light and two cars hit me, broke my fusion and ruptured my back again. So, we had to get the truck back, let it go back.

Q Okay. On your part then, as soon as you had passed the inactive time Dr. Horne had required, was it your intent to go back to work?

A Oh, definitely. That's why we bought the Ford, that's why we (inaudible) out that way.

MR. KING: Anything else you want me to

ask?

Nothing further.

MR. WALLACE: Mr. Schwenke?

MR. SCHWENKE: Yes. Just a couple.

CROSS-EXAMINATION

BY MR. SCHWENKE:

Q You stated that the checks that were received, you haven't seen it, and you haven't signed it, endorsed it; is that correct? That's your own testimony?

A Two of them I didn't see.

Q Two--

A Yes. Two I signed, and two I didn't sign.

Q And you also deny knowledge or denied in the criminal case, that you signed the other two checks?

A Right. I did not sign them.

Q And you're denying now that YOU went to the bank with me, like you denied it in the criminal case, and you signed the two checks in front of the bank officer, the checks that you claim--

A The time I went to the bank with you is when I found out that they took my $25,000, that was in my annuity.

That's the only time I went to the bank with you.

Q And in the criminal trial, the bank officer testified that you appeared with me, you showed him I.D. and you signed the two checks and he initialed that you showed him the I.D.; are you saying here that is false?

MR. WALLACE: Let me--I think you have two questions there; let's ask the first one.

Are you aware of what the bank officer testified to in the criminal matter?

THE WITNESS: I heard about it afterwards. But when I saw him and talked to him in the hallway, he didn't recognize me or know who I was.

MR. WALLACE: Okay. But you weren't--

THE WITNESS: I heard about it later--

MR. WALLACE: --in Court and didn't hear him testify to that?

THE WITNESS: No. I was just a witness (inaudible the D. A.--County Attorney or D.A., whichever it is, he was



trying it, as I was outside.

MR. WALLACE: Okay. Then the next question?

Q (By Mr. Schwenke) The question is

if the bank officer in his testimony claimed that you appeared with me before him, you showed him I.D., your I.D. and you signed the check before him, and he initialed the checks, that testimony would be a lie?

A I don't know if he was lying or not. I wasn't in the room. I did not go with you to the bank. I didn't cash the first--or sign those first two checks.

Q What time were the checks--

A In your office, the second two, I did not.

Q --that you claim you never signed?

A I did not go with you and I did not sign them.

They were proved forgery by our experts and you admitted to it in Court. I've got the transcript. You admitted forging my

name. I've got the transcript.

MR. SCHWENKE: I move to strike that, that's un-responsive.

MR. WALLACE: We need to proceed a little bit orderly. I'm sure you have some feeling about Mr. Schwenke and we need to have you just answer his questions as narrowly as you can, and then--

THE WITNESS: (Inaudible)

MR. WALLACE: --Mr. King--well, you're able to



answer fully. If there's something wrong with the way he asks the question, you can certainly correct that and say no, that's not correct; but try to limit your answers to what he asks you, and then Mr. King can bring out other matters from you that you may

have a feeling that you'd like to say to the panel, just to proceed in an orderly fashion. Thank you.

Go ahead, Mr. Schwenke.

MR. SCHWENKE: I--I believe she denied that--the testimony of the bank officer, and with that, I--I don't have no further questions.

MR. WALLACE: Okay. Anything further, Mr. King?

REDIRECT EXAMINATION

BY MR. KING:

Q The transcript you're referring to from the bankruptcy hearing, do you have that with you or is it available?

A From our pre-trial?

Q Well, you said there was a time that M,r. Schwenke said in some court, that

it was not your signature; do you have a--and you--and you said, as I understood it, that you had a transcript of that; did I understand you correctly?

A Yeah. I've got the whole transcript at home, I didn't bring that part and I'll get it, too. I don't think



I brought that part of the transcript. No, that's one part I didn't bring. It's real thick, I remember I had him do his entire testimony in Court that showed where he admitted it.

MR. KING: Okay.

MR. WALLACE: All right. Well--well, I have a few questions, we're talking a little bit vaguely and I want to be a little bit more specific.

You indicate that you endorsed the back of two checks; is that correct?

THE WITNESS: Yes.

MR. WALLACE: Do you know if those ere checks from the Western Insurance Company?

THE WITNESS: Yes, they were.

MR. WALLACE: Western Fire, in fact?

THE WITNESS: Yes.

MR. WALLACE: Was one approximately $27,800?

THE WITNESS: Yeah, I wasn't--

MR. WALLACE: Was one approximately $13,381?

THE WITNESS: Yes. Those two, I signed.

MR. WALLACE: What happened to the proceeds of those after you signed those checks?

THE WITNESS: I was told by Mr. Schwenke

that $13,000 went to pay my medical bills, and that the other check was to go in to an annuity for me for the $250 a



month for life--

MR. WALLACE: Was there-

THE WITNESS: --is what I understood.

MR. WALLACE: Did you understand that he should receive some type of a fee for services in settling this claim for you?

THE WITNESS: Oh. yeah, I knew he would thought they--

MR. WALLACE: What was your understanding with respect to the payment of that fee? Was that to come out of these two checks, or was that something else?

THE WITNESS: No, 'cause he'd already told me what those two checks were for;

medical payments and my annuity.

So, I figured he had got with them and settled and got some more money.

MR. WALLACE: All right.

THE WITNESS: I didn't know.

MR. WALLACE: And you don't recall ever having seen or negotiated or endorsed two other checks of identical amounts from the Colonial Pen Insurance Company?

THE WITNESS: No.

MR. WALLACE: Did Mr. Schwenke ever indicate to you that there was the possibility of obtaining more money than that which you signed? That is, that he thought it was a possibility that the insurance companies would pay



out $200,000

THE WITNESS: No. He told me that's the best I could do, and it was a darn good judgment for somebody who already had two previous injuries and problems, and that's the best I could do.

MR. WALLACE: I'm assuming that your fusion was down about L-4 and 5 if you're having leg troubles; is that correct?

THE WITNESS: Yeah. It was 3-4, 4-5 and S-1L5.

MR. WALLACE: Okay. Would you describe for us briefly the nature of the other two accidents that you had?

THE WITNESS: The first one, I was driving for CF and I don't know--they're--I don't know if you know--

MR. WALLACE: Consolidated Freightways?

THE WITNESS: Yes. They're not very good

equipment. The seat, air seat bottomed out on me on a construction bump, and it ruptured my low back and my neck and I have a chip floating in thevocalcords. So, I had one--the first surgery, they took care of one disk, I went back and I drove truck across country, my own, and the seat in the truck, they forgot to take the blocks off the airbags on my Ford, so the seat was pounding my back and it ruptured my back again, so I had a second surgery, which was the fusion. And then on that fusion, I was supposed to go back to driving, and that was the day, I was taking my



driver to the shop and I was going to go to Dr. Horne for permission to go back to driving.

MR. WALLACE: What was fused? What levels?

THE WITNESS: From the 3-4, 4-5 and S-1L5 all the way down.

MR. WALLACE: All the way.

THE WITNESS: I was there six months.

MR. WALLACE: And then, were you a passenger in one of these two vehicles?

THE WITNESS: No. I was sitting at a red light, when they collided with me, (inaudible) one pushed the other one into me. I was just sitting at the red light.

MR. WALLACE: All right. Were you hospitalized after that accident?

THE WITNESS: Yes.

MR. WALLACE: And how long were you hospitalized?

THE WITNESS: I had problems with one,

there was a piece missing out of the fusion and he said my body dissolved it and it was fine; so I sent all my X rays in to the specialist in Vegas, Dr. Williams. And Williams discovered that the chunk that was missing was actually in my spinal cord, it severed my spinal cord. So, he had to go in and take out the old fusion and replace the disk at the S1-L5, with something he calls Jel-Foam. And scraped all the tissues and whatnot, they took out the old fusion,



I have no (inaudible) joints or wing bones in my lower back any more for stabilization, that's why I have to have in-body fusion.

MR. WALLACE: Okay. There's some indication in the complaint that there were

outstanding medical bills at the time of settlement of the complaint for $11,179.96.

Is that--do you know anything about that?

THE WITNESS: I understood (inaudible) paid them--

MR. WALLACE: Pardon?

THE WITNESS: I understood that someone may have paid them; they gave me cash for the surgeon.

MR. WALLACE: Well, my question is, was that, to your knowledge, about the amount of the outstanding medical bills at the time of the settlement; that is $11,179.96.

THE WITNESS: No. I thought they were all paid.

MR. WALLACE: Okay. They had already been paid as of the time of the settlement?

THE WITNESS: Yeah. I thought they'd already been paid.

MR. WALLACE: What I'm--all right. Were there any other medical bills that were outstanding or unpaid at the time of the settlement?

THE WITNESS: There shouldn't have been, 'cause I'd already had my surgery and -



MR. WALLACE: Now, what was the surgery that was contemplated by this Dr. Watkins? Watkins, was it?

THE WITNESS: Watkins, right. He was a specialist that does body fusions for people who have had other surgeon mess up their back to the point that there's nothing left but to go through the stomach and fuse.

MR. WALLACE: Was Mr. Schwenke aware of

Dr. Watkins and the tests done by Dr. Watkins at the time of settlement of this matter?

THE WITNESS: Yeah. He knew I was going down there. He gave me my first $250 annuity check for the gas to go down there.

MR. WALLACE: All right. Now, the $250 annuity check, which you thought was coming from a purchased annuity; is that correct?

THE WITNESS: Yeah, it was supposed to have been Prudential, and we had he sign a paper--

MR. WALLACE: So the-

THE WITNESS: --to purchase the annuity.

MR. WALLACE: You used that $250 to help you go down to Los Angeles; is that correct?

THE WITNESS: To see Dr. Watkins

MR. WALLACE: Now, did you know you were going to go down to Los Angeles and see Dr.

Watkins prior to endorsing the back of the two checks you indicated you



endorsed?

THE WITNESS: The first two?

MR. WALLACE: Yes.

THE WITNESS: I don't know in what sequence.

MR. WALLACE: What I'm getting at is, did Mr.--

THE WITNESS: I mean, after my surgery, it had to be done, I had the Watkins, that was the next step.

Williams had already told me that after my surgery.

MR. WALLACE: Dr. Williams was the doctor who performed the surgery?.

THE WITNESS: Yeah. Did the--

MR. WALLACE: All right. Did--

THE WITNESS: --surgery.

MR. WALLACE: Was Mr. Schwenke--did you tell Mr. Schwenke that you had had the surgery from Dr. Williams and that you were probably going to need or possibly going to need further surgery and you were going down to see--

THE WITNESS: Yes. He knew that.

MR. WALLACE: Did he know that prior to the settlement? That's what I'm getting at.

THE WITNESS: It was prior to the second two checks, it was before the second two checks.

MR. WALLACE: It was before you found out about the second two checks?

THE WITNESS: Yes.

MR. WALLACE: But it was after the first two checks were signed by you, endorsed by you?

THE WITNESS: Exactly on that, I'm not sure.

MR. WALLACE: All right. You had had the surgery prior to signing the two checks?

THE WITNESS: Before I signed them. Yeah. One back surgery.

MR. WALLACE: One back surgery.

THE WITNESS: So, he must have known, yeah.

MR. WALLACE: Okay.

THE WITNESS: Because I knew right after Williams that I was going to have to go to Watkins for an in-body fusion; Williams had already told me.

MR. WALLACE: Did--did you ever talk to

Mr. Schwenke? If you think--I mean it sounds like that you're a little bit vague, but you think maybe he should have known; did you ever talk to Mr. Schwenke and say, well, look, they've covered my medical expenses up to now and if these are the total settlement proceeds, how am I going to pay for the surgery that~ I may have to have from Dr. Watkins in Los Angeles? Do you understand where I'm going?

THE WITNESS: Oh, okay. I'm vague on that. I know there was a discussion of it, where the money was going to come from: I'm not sure if I figured he could get



more or he would still try to go after them for more, if I needed the surgery or had the proof of it or what, I'm not sure. I

don't recall that. But he did know I had to have surgery, and he knew I was going down there for a check-up.

MR. WALLACE: He--he--did he know you were going to have to have surgery or did he know you were going down to have a check-up to see if you may need some further surgery?

THE WITNESS: No, I didn't go down to see if I needed it, it was to see if he could help me. It was needed It was just to see if the one person that could help me.

MR. WALLACE: What was the surgery Dr. Watkins was going to do-

THE WITNESS: The in-body fusion.

MR. WALLACE: --for 96,000?

THE WITNESS: The in-body fusion.

MR. WALLACE: Okay.

THE WITNESS: Go through the stomach,

fusion of the spine.

MR. WALLACE: Okay. Anything? Okay.

Any questions?

MS. WILKINS: Have we established the amount of money that she has received?

MR. WALLACE: It's probably--do you know if the total of the number of payments you've received, these $250



payments is approximately $4,500?

MR. KING: Pursuant to the judgment, he made one $250 payment and he conveyed a piece of property worth a couple of thousand dollars, and that's why the judgment is for 97,000, making full credit for the payments made, 'cause if you'll notice the judgment, I waited a year trying to get more before I took the final judgment to the judge.

MR. WALLACE: Okay. Let me--did you at some time have some understanding that two pieces of real property were going to be conveyed to you, one in Duchesne County, one in Weber County?

THE WITNESS: Just the one in the Duchesne, the one above Uintah.

MR. WALLACE: Above Uintah? In Weber County, up near Ogden

THE WITNESS: Yeah--no. Is that what it is?

MR KING: Uh huh (affirmative).

THE WITNESS: Oh, yes. Yeah, That first was like (inaudible) his wife's name was on it.

MR. WALLACE: Okay. Did you know anything about any agreement that another piece of property would be transferred to you

in some fashion, out in Duchesne? I was wondering if you had heard anything like that.

THE WITNESS: Well, I thought that the five acres



was in Duchesne, it's just above Vernal in the mountains.

MR. WALLACE: Just above Vernal in the mountains?

That's the one you've received? I've forgotten now which one you received.

THE WITNESS: Yeah. Through Bruce. Bruce is the one that gave it to me (inaudible)

MR. WALLACE: Okay. Now, back up. Did you hear anything about supposedly another piece of real property supposed to be

transferred to you to help settle this claim?

THE WITNESS: No. One time they offered an eight-plex and stuff, when Jim Hawkes was my attorney, but I don't recall any other than that five acres up by Vernal that Bruce gave me.

MR. WALLACE: Okay.

THE WITNESS: Was it two different properties? thought just the one up by Vernal.

MR. KING: May I respond?

THE WITNESS: Oh.

MR. WALLACE: Well, let--I just want to get what she knows now. Just one other question. Did you ever receive any proceeds from two checks, to your knowledge, receive the proceeds, have use of the money from two checks from Colonial Penn, one for

approximately $27,847 and one for



$13,3817

THE WITNESS: For two years, I was getting these so-called annuity payments which was supposed to be the 27,000-some-

MR. WALLACE: Right.

THE WITNESS: I wheeze getting the 250 a month until September of '87, I believe it was, was when I found out through my bank that it wasn't coming as an annuity, that it come from his personal account, and that's when I started investigating it; so it must have been, what, about two years, I guess, I got the 250 a month.

MR. WALLACE: Okay.

THE WITNESS: And he did wire me some money in L.A.

MR. WALLACE: How much was that?

THE WITNESS: I don't know exactly.

MR. WALLACE: Is that while you were seeing Dr. Watkins?

THE WITNESS: Yeah. That's while I was down there.

MR. WALLACE: Approximately how much would you guess? Was it $100, $50, a thousand?

THE WITNESS: Oh, no, it was a couple thousand. Is it in there? I'm sorry, I don't know exactly.

MR. KING: If I might, your--if we could refresh



the witness ' recollection by Page 4, Paragraph lOA of her trial brief, she has the itemization of dates and amounts.

MR. WALLACE: All right.

MR. KING: And that was information we received from her, so it might refresh her.

MR. WALLACE: How much does that state?

Do you have an objection if I ask how much it was that you sent her down in Los Angeles?

MR. SCHWENKE: No.

MR. WALLACE: How much was it?

MR. KING: Okay. It's a pleading the Court has in its file. September--was made on September 23, 1985, I'm quoting, because plaintiff was to see Dr. Watkins on September 25, 1985, in Los Angeles for testing and for further surgery. She'd been notified this testing alone will be $6,000, defendant gave her the $6,000 on the date of the settlement, 5,000 more two days later when she was in Los

Angeles, and then the other 310, 'cause he had a total credit originally of 11,310. And nothing more. And he did for two years pay on the annuity at 250 a month; we have a disagreement, he claims that's 6,000, we claim it's 4,500.

In the pleadings we've used, we've accepted his 6,000 as paid on the annuity, so she'd have a total of 17,000 paid.

MS. WILKINS: Plus a piece of property.



MR. KING: The piece of property in--by Vernal has been received, it is undeveloped recreational property with no access; maximum value $2,000. The piece of property--

MR. WALLACE: Well, I think we're getting into some facts, we probably ought to--

MR. KING: Oh, I know, but I thought I was responding to the question.

(Inaudible)

MR. WALLACE: Well, I think I asked if he had an objection if we asked how much was sent to her in Los Angeles.

MR. KING: Six thous--five thousand.

MR. WALLACE: All right. And what--what is this 6,000? When did you receive that 6,000?

THE WITNESS: I don't remember exactly.

MR. WALLACE: Was that in addition to the $27,846.88 that you received when you signed the checks?

THE WITNESS: I didn't receive that.

MR. WALLACE: Oh, you didn't receive that, that's right.

THE WITNESS: That went into the annuity, the 250 a month.

MR. WALLACE: All right.

THE WITNESS: And 13,000, I was told, was to pay my medical bills.



MR. WALLACE: Okay. So you've received $6,000 and then another time 5,000 while you were in Los Angeles, and then another time $310?

THE WITNESS: I don't remember the 310 but I do remember the other.

MR. WALLACE: All right. And then another $6,000 through annuity payments, $250 a month annuity payments?

THE WITNESS: That was about two years I got the 250 a month.

MR. WALLACE: All right. Anything--any

other questions?

MS. WILKINS: So, the amount of money she should have received, total? Is how much?

MR. WALLACE: That's--

THE WITNESS: The four checks, there was two of them the something, equal, and two of them for the 27,000 equal--

MS. WILKINS: So--so minus his attorney's fees, is that right?

MR. SCHWENKE: I'm sorry. I didn't hear that. What was that amount, please?

MS. WILKINS: Just trying to establish how much money she should have received from those four checks that were made from the insurance companies, and I guess we've already heard what your attorney's fees were supposed to be.

MR. WALLACE: All right. Anything further, Mr. Schwenke, after--

MR. SCHWENKE: No.

MR. WALLACE: --that you'd like to ask of the Witness?

MR. SCHWENKE: No.

MR. WALLACE: All right. You may step down.

Now, let me just as~ if we--maybe it will save a Little bit of time if we can stipulate that two checks were issued by Western Insurance Company, one for $27,847.88 and one for $13,381.88 is that correct?

MR. SMITH: That's correct

MR. SCHWENKE: I'll stipulate to--

MR. WALLACE: You'll stipulate to those--

MR. SCHWENKE: --whatever the

amounts--yeah

MR. WALLACE: --whatever the amounts were. In the complaint, by the way, Mr. Smith, I found a--in the complaint, it indicates 82--the sum of the four checks is $82,359.52, I think they really add up to $82,459.52. And at any rate--

MR. SMITH: Okay. We--whatever the arithmetic shows.

MR. WALLACE: All right. Mr. Smith, your next witness?

MR. SMITH: Mr. King.

66

SAMUEL KING, called as a witness by and on behalf of the Bar Council in this matter, after having been first duly sworn, was examined and testified as public.

DIRECT EXAMINATION BY

MR. SMITH:

Q State your name for the record, sir.

A Samuel King.

Q And your occupation?

A Lawyer.

Q And your business address, please?

A 2120 South 13th East, Salt Lake City, Utah 84106.

(Inaudible)

Q And what's your relationship to this matter now before this hearing panel?

A I'm the attorney for Mrs. Sur.

Q All right, sir. I'm going to hand you what's been marked as Exhibit 3 in this proceeding and ask if you can identify that for me, please?

MR. WALLACE: What are you looking for?

MR. SMITH: For the (inaudible)

MR. WALLACE: I don't have it, I've never seen it.

(Inaudible)

Q (By Mr. Smith) Now, here it is; the first document is a stipulation and order signed by--this



stipulation is signed by--or the order is signed by Judge Rokich, October 6th, 1989. Tell me, what were the proceedings which precipitated and resulted in this order, can you tell us about that, please?

A We had a pre-trial conference--excuse me, we had a trial on September 19th that Mr. Schwenke was present at, pro se. I was present. Rather than try the case, we worked out a stipulation which

we read into the records.

Q Who were the parties to that stipulation?

A Mrs. Sur, Mr. Schwenke, myself, and my associate, Ken (inaudible)

Q Okay. And this Bruce Udall wasn't involved?

A No.

Q And I'm also going to hand you before you go further, what has been marked as Exhibit 4 and ask you if you can just identify that for the record, please?

A This is a stipulation and order I received in the mail from Mr. Schwenke.

Q Okay. What's the difference between Exhibit 3 and Exhibit 4? They both have the same title, do they not?

A They do.

Q Same document?

A On Exhibit 4, Mr. Schwenke has deleted some of the terms.

Q Okay. You received this--this document then



before you in the mail directly from Mr. Schwenke?

A Yes.

Q And does it bear a signature?

A A. Paul Schwenke.

Q Okay. And what's been deleted?

MR. SCHWENKE: Excuse me. I don't have No. 4.

MR. WALLACE: Yeah, I'm wondering if we could--

MR SMITH: What we ought to do is to have some copies made.

MR. WALLACE: I'm wondering if we could take and 11 have some copies made so we could all see it.

MR. SMITH: Okay.

MR. WALLACE: If that would be appropriate.

Do you have something else you could go ahead with him?

MR. SMITH: If we could talk about the original, while she's gone.

Q (By Mr. Smith) Let's go back to Exhibit 3. Was that Exhibit 3 made a copy of the Court record as it currently exists or was it changed in some way?

A Because Mr. Schwenke changed the terms of the stipulation read into the record at the time of trial--

MR. SCHWENKE: I object. I mean, this

is just his conclusion of what the stipulation was read in the Court. I mean, I obviously disagree with the stipulation in



--in that matter, and secondly, I think if he's--if Bar Council has these witnesses here, all these matters from other proceedings I believe should not be used here, if he's got his witnesses, he may put on his case, put on his witnesses instead of relying on matters of another proceeding.

MR. WALLACE: Okay. I'm going to overr--well, I'm going to sustain the objection and ask us to lay a little further foundation as to how

MR. SMITH: Okay.

MR. WALLACE: --the witness may know that Mr. Schwenke agreed, if he did, to the

stipulation, what was read in the Court, under what circumstances, whether Mr. Schwenke was there, that kind of thing.

MR. SMITH: Very good.

Q (By Mr. Smith) Was Mr. Schwenke present when the stipulation was read into the record?

A Yes.

Q Did he agree to it?

A Yes.

Q Did he have--voice any objection whatsoever to the stipulation? A The stipulation was the result of a great deal of negotiation, once negotiated (inaudible)

Q This is--this stipulation you're referring to now



is Exhibit 3?

MR. WALLACE: Well, let me go back a minute. 3 What was read into the Court? Was it Exhibit 3 or was it 4 Exhibit 4 as modified by Mr. Schwenke?

THE WITNESS: It was Exhibit 3.

MR. SCHWENKE: If I may respond to that. This is his view of what was read to the Court.

MR. WALLACE: Right. And that's all we can do is, with each witness, take this witness' own view, and you can certainly take--be sworn and give your view of what the matters are at an appropriate time but we recognize that this is his view of what happened.

MR. SCHWENKE: That's correct, and this was not read into the record in the Court as the stipulation, this document.

MR. WALLACE: Okay. We will allow you to take the stand and testify that it wasn't read in and what went on, but we--we've got to hear what his evidence is and testimony and then we'll hear yours, also, even though you may disagree with it. All right. You may proceed, Mr. Smith. MR. SMITH: All right.

Q (By Mr. Smith) So, Exhibit--so your testimony the this is Exhibit 3 was the stipulation between you and Mr. Schwenke?

A The stipulation was written after I let the Court

look at the files and dictated it; but it was, to my knowledge, a faithful restatement of the verbal stipulation.

Q And the two documents you have in your hand, if I could refer to those to substantiate what I'm saying.

MR. WALLACE: Okay. So let's back up a minute. You stated some stipulation on the record in front of Judge Rokich with Mr. Schwenke present; is that correct?

THE WITNESS: That's correct.

MR. WALLACE: After whatever stipulation was orally stated on-the record, you went back to your office and attempted to faithfully recount what that oral statement was in Court; is that correct?

THE WITNESS: That's correct.

MR. WALLACE: So, this isn't word for word

what was stipulated to in Court? By this, I mean Exhibit 3.

THE WITNESS: Correct.

MR. WALLACE: All right. Then after Exhibit 3 was created by you, you sent a copy of that to Mr. Schwenke?

THE WITNESS: That's correct.

MR. WALLACE: And then you received back in the mail Exhibit 4, which had some modifications and changes; is that correct?

ThE WITNESS: That's correct.

MR. WALLACE: Alright. Go ahead.

MR. SCHWENKE: With my signature.



MR. WALLACE: With--with Mr. Schwenke's signature?

MR. SMITH: Mr. Schwenke then is acknowledging

that that is his signature on Exhibit 4?

MR. SCHWENKE: That's correct.

MR. SMITH: Okay. That's fine. Because both exhibits have the language that I want in them--in the record so I would offer both of those exhibits with those qualifications as outlined by--

MR. WALLACE: We'll receive Exhibits 3 and

(By Mr. Smith) All right. So both the--both of the exhibits, let me draw your attention, Mr. King, to Exhibit 4, which is the one that Mr. Schwenke indicates is the more correct of the two exhibits.

A Uh huh (affirmative)

Q And on Page 4, I guess I'll call if the first full paragraph, starts out! "Such judgment"; what does that say?

MR. WALLACE: Where are we? At Page 4? I

think we can read what it says.

MR. SMITH: Okay. Thank you.

MR. WALLACE: This is the best evidence. He doesn't have to testify to it.

MR. KING: On Page 4 and on Page--

MR. SMITH: No, that's all right. We--it's been drawn to the attention of the panel, and I just wanted to



indicate the wording of that stipulation to the panel.

MR. WALLACE: And which paragraph do you want us to specifically this to?

MR. SMITH: Well, Paragraph 4 on Exhibit 4, read the language there indicating the basis upon which the 6 judgment was based.

MR. WALLACE: Now, you mean Paragraph--

MR. SMITH; It's in Paragraph 9 on-- 9

MR. WALLACE: Paragraph 9 on Page 4 to

MR. SMITH: --Page 4.

MR. WALLACE: Well, wait--mine's three pages, three and four are inverted, and so--

THE WITNESS: And similar language in Paragraph 3, Page 2.

MR. SCHWENKE: May--may I re--make a comment?

MR. WALLACE: Yes, Mr. Schwenke.

MR. SCHWENKE: By way of objection? The civil matter and the settlement arising to, as far as the amount, I--no bearing whatsoever on the actual settlement of the claim to Mrs. Sur--

MR. WALLACE: Mr. Schwenke, what I think we ought to have you do is bring that out on cross-examination and I'll let you ask him questions about that, how this amount

was derived and how they--that matter may differ and why it doesn't bear a relationship to the amounts brought out in



I the insurance, and I'll allow allow you to testify about that and we'll also allow you to argue that.

MR. SCHWENKE: Well, I--I think you're missing my--my-

MR. WALLACE: Go ahead and state--continue, I didn't mean to cut you off.

MR. SCHWENKE: --my point. I think that this obviously was a settlement and--and I believe we--we do have rules with respect to settlement and so forth and disclosure of those settlements; but settlements in--as reflected here as the amount as admitted to in counsel here and the amount of the

settlement are two different amounts. There were settlements derived for totally different purposes and it's not--not in any way relevant to the facts that they have the burden to put forth here, which are the facts of the alleged amount that was actually supposed to have been received and the amount that was received and so forth. And this settlement was con--a totally different and separate proceedings arrived at for a totall different consideration, it's not relevant.

MR. WALLACE: All right. Let me, and your--the objection is lack of relevance, and also that the matters concern offers of compromise and settlement which are inadmissible under the Rules of evidence; is that your objection?

MR SCHWENKE Yes. Sir

MR. WALLACE: All right. Concerning the offers of compromise and settlement, I believe the language, although I don't have it here with me, really deals with offers of settlement and settlement negotiations, not actually settlements arrived at. As far as lack of relevance, I don't think we have enough information to determine at this time whether it's relevant. What you say may be true and I'll allow you to go into that on cross-examination and also argue that, but right now, we'll hear what this element has to do with it and find out if it has any relevance. If it doesn't, we'll disregard it, Mr. Schwenke.

MR. SCHWENKE: Thank you.

Q (By Mr. Smith) Okay. Tell me, sir,

this settlement was in the amount of how much was the dollar amount of the settlement?

A 87,000.

Q And why did--what was the basis upon which this action was brought against the--Mr. Schwenke? Did it have anything to do with the case we're hearing here today?

A Mr. Schwenke's fee at 28% would have been roughly 25,000; instead, he kept everything except the money that Mrs. Sur has previously described.



Q In other words--so, what did this judgment represent?

A It represented a judgment against Mr. Schwenke 4 for fraud from professional-5

Q Arisins out of what?

A Arising out of his misrepresentation of his client (inaudible)

MR. WALLACE: Well, let me--let me ask this. Tell us everything you knew about why--let's see, where is the amount? Looking at Exhibit 4. Tell me what you know about the amount of the settlement and how that was negotiated, and what, to your knowledge, that represents; just a dollar amount, what is that dollar amount? How was it arrived at, if you know?

THE WITNESS: I'm sorry. Would you restate that question? I don't know what you mean.

MR. WALLACE: All right. Exhibit 4 represents a stipulation and order, and the stipulation has to do with certain amounts to be paid, or that a judgment may be entered with respec t to I is that correct?

THE WITNESS: That's correct.

MR. WALLACE: How were those amounts arrived at and what do they represent, to your knowledge?

THE WITNESS: The $100,000 was arrived at as a compromise. Mr. Schwenke-

MR. WALLACE: Compromise of what?

THE WITNESS: Of Mrs. Sur's claim against 3 Mr. Schwenke.

MR. WALLACE: Which was what? Was this a ma practice claim, was this a property damage claim that has has nothing to do with this? Or was it a-

THE WITNESS: It was a legal malpractice action.

MR. WALLACE: All right. And the 100,000 was some type of a compromise?

THE WITNESS: Uh huh (affirmative).

MR. WALLACE: All right.

Q (By Mr. Smith) And--and what were the facts upon which the malpractice action was based?

A At the pre-trial conference in the case, I had George Throckmorton, probably the State's most reputable 16 handwriting examiner, this is through conference with the Court and with Counsel, we were attempting to see if we could resolve the case at pre-trial. Mr. Throckmorton was present, his testimony was that Mrs. Sur's signature on the second two checks were forgeries. Mr.-

MR. WALLACE: Well, did this actually go to a hearing? A trial? I'm confused a little bit; I thought this was a settlement prior to trial.

THE WITNESS: We settled on the day of trial, at



I the pre-trial conference, shortly before. We had our handwriting expert present and so did Mr. Schwenke's have his opposing handwriting present--expert present.

MR. WALLACE: And those two witnesses were sworn and testified?

THE WITNESS: They did not; but they did report to the Court that--in a proffer, Mr. Throckmorton had said that h e had talked to her expert--

MR. SMITH: Just a moment, I can give you that name.

MR. WALLACE: Well, let--I think we're getting a little bit a field here. The

question to you, or. King, the question to you was, what were the grounds for the mal practice suit? What did it arise out of?

Q (By Mr. Smith) Did it have anything to do with Mr-

MR. WALLACE: Don't lead him. I want to--

MR. SMITH: Okay.

THE WITNESS: Mr. Schwenke forged Mrs. Sur's signature to the second two checks totally $47,000.

MR. WALLACE: That was an allegation in the malpractice complaint?

THE WITNESS: Right.

MR. WALLACE: And the sec--the other two checks are the two checks from Colonial Penn Insurance Company?

THE WITNESS: She did endorse those

MR. WALLACE: All right.

THE WITNESS: And she received the money that she's indicated Now, the second major part of the claim, and Mr. Schwenke's admitted this himself, it's on the documents that he's submitted to the Court; both defendants had $100,000 liability coverage. And liability was so clear, and already, she had 11,000 in medical, and the insurance files also reflected that Dr. Watkins has a national reputation for quality; that they were both prepared to pay out the full $100,000 benefit.

MR. WALLACE: What evidence do you have that the two insurance companies were ready prior to the settlement negotiated by Mr. Schwenke, to pay out their full limits?

THE WITNESS: Well, insurance company memorandum that Mr. Schwenke delivered to the District Court, plus the insurance company--

MR WALLACE: There were two memoranda I is that correct?

THE WITNESS: Uh huh (affirmative)

MR. WALLACE: One from the Western Fire and one from Colonial Penn?

THE WITNESS: One from one company, we're referring to conversation with the adjustor for the other



So there was $200,000 available, we claimed.

MR. WALLACE: All right. That was your claim that there was that available it was also your claim that the insurance companies prior-to the settlement negotiation, they were ready, willing and able to pay out

$200,000; is that what you're saying?

THE WITNESS: They would have made a report from Dr. Watkins. Mr. Schwenke at this time, again he claimed, was having severe financial difficulty (inaudible) rather than waiting for Karyn to return from Los Angeles with a report from Dr. Watkins, he settled promptly, he gave himself essentially the same thing he would have had-

MR. WALLACE: That again was your allegation in the malpractice case?

THE WITNESS: Malpractice case, that's right.

MR . WALLACE: Okay.

MR. WILKINS: Excuse me.

THE WITNESS: The difference being that she received about 120,000 less.

Q (By Mr. Smith) But the bottom line is

that this settlement, this Exhibit 4 was based upon Mr. Schwenke's representation of your client, Karyn Sur, in connection with this automobile accident that she previously testified about; is that correct?

A Yes.



MR. WALLACE: Now, I'm a little bit confused. You said she did negotiate, endorse the two Colonial Penn checks?

THE WITNESS: Mr. Schwenke gave her the checks she claims, and she signed them at his office and didn't see them again.

MR. WALLACE: All right. Now what about the two Western Fire checks?

THE WITNESS: She never saw them, was never aware of them, didn't know any--didn't-

MR. WALLACE: Okay. That was part of

your allegations in the complaint?

THE WITNESS: Right.

If I might clarify that, I think this would save some time. Mr. Schwenke has deni--has denied, all through this, that she was unaware, he said that she went to the bank with her, identified herself to the bank officer, and that she signed both those checks. This is where the handwriting experts become important, because hers and his both said her signatures had been forged, so she didn't go to the bank. So then he did take all that money and put it in his own account and didn't share a penny of it with Mr. Udall, nor with her.

And we had all this evidence prepared to establish at trial.

MR. WALLACE: Mr. Smith?

MR. SCHWENKE: I have objection to all this line, like I say, this evidence, (inaudible) for this panel to consider, but not the representations of counsel. Obviously you know, we didn't--I haven't agreed to those, or denied all of those allegations in that proceedings, and if the- if the Court would allow the testimony as to the stipulation I think the panel is going way beyond that stipulation by having him testify as to these allegations that were unproven, has not been proved.

MR. WALLACE: Mr. Smith, what do you say to the objection?

MR. SMITH: No. No, my--my only point is--the only thing I wanted to do with this witness was to enter this--these Exhibits 3

and 4 and the basis for these exhibits, indicating that these were his stipulation, in which this respondent believed and admitted on the record that this did occur, the basis of why it occurred and that it was based on the law.

MR. WALLACE: The last statement of the witness, which I don't think was really responsive to a question will be stricken.

MR. SCHWENKE: Thank you.

MR. SMITH: Thank you. I have no further questions.



MR. WALLACE: No further questions.

Mr. Schwenke, your cross-examination?

CROSS EXAMINATION

BY MR. SCHWENKE

Q Now, just one question, Mr.

King. Don't you think if there was more money to be gotten from the insurance company that more money would have been received? I mean, more money would have been demanded and received? Yes or no.

A As far as Mrs. Sur is concerned, over $100,000 more money would have been received. As far as you were concerned, you received virtually the same money--

MR. SCHWENKE: Objection, non-responsive.

THE WITNESS: --you would have received on a 15 percent fee, and you had the advantage of having it in your hand.

MR. WALLACE: Objection's overruled. That may have been responsive.

Go ahead and ask further questions to clarify if that wasn't what you really wanted

to get into.

Q (By Mr. Schwenke) The total of the four checks that were alleged to have been part of this settlement that's reflected in the complaint, formal complaint, Paragraph 20, which states that the 82,000, with the correction by Mr. Wallace; 459.52; do you disagree with that



amount, that that's the total amount that was received for the settlement?

The total was approximately $82,000. Is that the question?

MR. WALLACE: That was the question. Although Mr. Schwenke was more precise and had the full total.

THE WITNESS: If that's--yes, I'll agree.

Q (By Mr. Schwenke) And the civil matter that you filed on behalf of Mrs. Sur against me, alleged a mis-representation cause of action; is that correct?

A Can I get that? It'll only take a second.

Yes. It did have that cause of action.

Q Now, isn't it a fact that the $100,000 was simply an amount arrived at just to settle the matter, was not base on anything other than that was at the time an amount arrived at to settle, but not based on any amount that was received and not--and owed to your client; is that correct?

A That $100,000 was based on several factors. We felt that you owed her over $100,000 if you'd prosecuted her claim and got a full settlement. With $100,000, that

she would have enough money to have the necessary surgery. We didn't think that if we got a judgment for the full amount, loss of earnings, delay and so forth, that you would pay that. We reduced our claim by hundreds of thousands of dollars to 100,000. hoping you would pay that figure.



MR. SCHWENKE: Okay. No more questions.

MR. WALLACE: Mr. Smith?

MR. SMITH: No questions.

MR. WALLACE: You may step down.

THE WITNESS Thank you

MR. SMITH: We have nothing further to offer in the Karyn Sur matter, we're ready to present evidence on the other matter if you want to take--

MR. WALLACE: he'll, let's take a brief--let's take five minutes, is that all right? I hate to delay people too much longer; but let's have a little break.

(Off the record.)

MR. WALLACE: We're back on the record in the matters of the two complaints against A. Paul Schwenke.

Mr. Smith, you may proceed.

MR. SMITH: Thank you, sir.

I think--Mr. Schwenke indicated to me during the break that he might be willing to stipulate to some of the matters in F-478 that might--to streamline the situation just a little bit. I recognize, of course, we have a default, and that the matters set forth in the formal complaint are deemed to be true, and the matters that we're

simply putting on the record were simply by way of making the record, and to establish the injury and the harm that had occurred to the--to his former clients. I was going to



offer into evidence the exhibits pertaining to the altered checks. I think Mr. cS cih wde nnk e i s willing to stipulate to that, in which case, all I'd have to do then is call Mr. Wade regarding the injury that he suffered.

MR. WALLACE: Mr. Schwenke?

MR. SCHWENKE: Yes. I--what I asked counsel is I feel somewhat constrained in this matter because of the pending criminal matter, and--

MR. WALLACE: Okay. Let

me--let's--things are starting to, you know, be a little clearer to me now. There is a criminal complaint pending against you, is that right, Mr. Schwenke?

MR. SCHWENKE: I was arraigned by the criminal prosecution--

MR. WALLACE: And does that arise out of the matters with regard to Mr. Wade?

MR. SCHWENKE: With the Wade matter.

MR. WALLACE: All right. And of course, you have an absolute right to remain silent and not give any evidence which might be used in any criminal proceeding, and you understand that?

MR. SCHWENKE: Well, that's correct.

MR. WALLACE: And anything you say here is not privileged in any fashion and could be used in the criminal proceeding. That does

put Mr. Schwenke at a little bit of a disadvantage with respect to putting on evidence.

MR. SMITH: What we could do is this, is--like I say, since the matters are--are admitted and in default, I could just simply put on Mr. Wade to testify strictly in the area of the harm that's come to him as a result, and we could--without going into these other matters, the checks, because there's--they're on the record as to what they were, what happened, and default's been entered on

the--on the allegations set forth in the formal complaint, let's see, this formal complaint is--what number-

MR. WALLACE: Well, put on what evidence you want to put on, Mr. Smith, and we'll see

what we may need-

MR. WILKINS: Could we have a little conversation?

MR. WALLACE: Yeah, maybe we should--maybe we should--let's have a little break and let us discuss a few things at this time.

MR. SMITH: Okay. All right.

(Off the record.)

MR. SCHWENKE: --just, sir, since I make the motion already and you were going to consider it after all the evidence is in, I again ask that perhaps it might be helpful if the response, for purposes of mitigation or what not, to be, you know, reset for another time.

MR. WALLACE: All right. Thank you.

(Off the record.)

MR. WALLACE We have the two formal complaints. Both formal complaints have--have been defaulted, we recognize that default.

Under the rules, it indicates that when there's a default, we then should assume that the allegations in the complaint are true. A hearing would then be held on what the appropriate discipline should be.

I'm assuming then, and the question is, what discipline should be resolved from the complaint, and with regard to that discipline, I assume that we should receive evidence of aggravation, evidence of mitigation.

Mr. Schwenke is in a--is in a very bad position to take the stand with respect to

the Wade matter with respect to mitigation. We can't see how he can get on the stand and say, for example, okay, I-I-- -the allegations are admitted; however, I had some proper reason for doing this, or I had something else in mind, that I intended to do something and it didn't work out and I never had sufficient intent to do these types of things; he just can't speak to that issue, or he may well say something to incriminate himself.

It's our feelings, with extreme apologies to the witnesses who are here with respect to the Wade matter, but we don't think we will proceed on the hearing on mitigation



and aggravation in the Wade matter, because it wouldn't be a valid hearing, we would

hear one side.

We intend to take--have Mr. Schwenke take the stand, if he wants, or present a defense with respect to the Sur matter, and determine our recommendation of the discipline with respect to the Sur matter. And if we heard the Wade matters, even though we think we could, you know, put it off to the side and not consider it, we may be in the future, subject to some criticism because we heard one half of the Wade matter and then went ahead and decided the discipline on the Sur matter.

So at this time, and again with apologies to the witnesses you have here, Mr. Smith, on the Wade matter, we think it would be appropriate to continue the hearing on the Wade matter until after the criminal

complaint is resolved, but we intend to fully hear and litigation the Schwenke matter today and try to come to some resolution on the Schwenke matter today.

MR. SMITH: You mean the Sur matter?

Mr. WALLACE: I mean the Sur matter.

MR. SMITH: Uh huh (affirmative).

MR. WALLACE: Excuse me, the Sur matter today.

MR. SMITH: All right.

MR. WALLACE: And so that's where we are.

MR. SMITH: All right, sir.



MR. WALLACE: Do you have anything else to present on the Sur matter at this time?

MR. SMITH: Only by--if you're talking by way of extenuation, mitigation, aggravation, we believe that the prior

disciplinary activities can be considered as an aggravation, and so we would offer his prior disciplinary record or your consideration.

MR. WALLACE: All right. In what form are you going to offer that?

MR. SMITH: We have--I have copies here of findings and facts, conclusions of law and recommendations and order of discipline entered in prior matters that are concluded, and would offer those. And we have the originals these are copies, however, I have the original files here.

What I just gave you was that which we've had marked as an exhibit, and it represents the action in F-281.

MR. WALLACE: All right. It' 5 not marked as an exhibit number?

MR. SMITH: No, it's not marked.

MR. WALLACE: Let's have that marked as Exhibit 6 if we may.

We now have received Exhibit 6 which is in the matter of the complaint of Kirt--Kirk Heaton against A. Paul Schwenke, F-281.

Have you received a copy of those findings and



conclusions, Mr. Schwenke?

MR. SCHWENKE: I have.

MR. WALLACE: Just now?

MR. SCHWENKE: I just have, now.

MR WALLACE: Do you have an objection to our receiving those on the issue of aggravation?

MR. SCHWENKE: Yes. This was the matter that I referred to in my opening statement

that was decided in August, 1990, by way of a motion for sanctions, for discovery, sanctions, and this was the matter I specifically instructed Mr. Johnson to be in contact with to make sure, because I was--intended to file an appeal on it.

This matter, however, was not presented to the Supreme Court until seven months later, in March of 1971 (sic) and the Supreme Court without objections entered that, so my--my objection's basically on--based on the fact that this .matter was not properly served wherein I could then file my--my appeal to. And this matter as now--I'm filing a motion with the Supreme Court to set this matter aside based on the fact that this seven months for the Bar to do something where they didn't, and when they finally did

something, I--you know, I wasn't here, and I wasn't personally served, I believe, according to the rules.

And I paid for that. If it is to be considered by the panel, if in the long run, the Supreme Court might



rule against it.

MR. WALLACE: Let me ask you, there's--the last two pages of Exhibit 6 are the order of discipline of suspension signed by the five Justices of the Utah Supreme Court; do you have an objection also that we receive that two-page document?

MR. SCHWENKE: No No

MR. WALLACE I am--we're going to allow the document to be received as Exhibit 6, based upon the fact that I don't think we, in

this panel, should go behind the--try to second guess what another panel did, we don't have enough time here to try the issue of whether or not this was appropriate entered. On the face of the matter, it is signed by the chair of the disciplinary hearing panel, and that is--forms--the findings and conclusions form the basis of the order of discipline of suspension of the Utah Supreme Court, and we will receive that, not look behind it to whether or not it was appropriately entered. That will give you other remedies to try to handle that matter.

MR. SMITH: And the same, may we offer the next exhibit in order, Exhibit 7, which is the same documents pertaining to F-241? It's the findings of fact, conclusions of law and order of discipline entered by the

Supreme Court in the previous matter.



MR. WALLACE: Have you just received a copy of those findings and conclusions-

MR. SCHWENKE: Yes. I-

MR. WALLACE: --which are now marked Exhibit 7, Mr. Schwenke?

MR. SCHWENKE: I have now received them.

MR. WALLACE: Do you have an objection to the receipt of that into evidence?

MR. SCHWENKE: No. Not to No. 7.

MR.WALLACE: All right.

MR. SMITH: We have no further evidence to offer in regard to the Sur matter, subject to rebuttal, of course, should Mr. Schwenke decide to; but enter any matters in regard to Mr,--to the Sur--

MR. WALLACE: All right. I might--I

might indicate that-those who are here on the Wade matter certainly are welcome to remain, but they may leave if they desire and that's up to them, but we again apologize for any inconvenience, but we appreciate the interest that the witnesses may have in trying to help come to the bottom of whether or not attorneys should be disciplined. It's a time consuming effort and we appreciate the public service in appearing, you're welcome to stay or leave.

Mr. Schwenke, we're now going to turn to you and ask for any mitigating evidence you'd like to present in the



sur matter alone, we will not hear anything with respect to the Wade matter because

of the pending criminal charges.

MR . SCHWENKE: Okay. If I may be sworn?

MR. WALLACE: Yes.

A. PAUL SCHWENKE,

the respondent herein, after having been first duly sworn, was examined and testified in his own behalf as follows:

DIRECT TESTIMONY

MR. SCHWENKE: If I may begin to stating what I believe was determined in the criminal prosecution of this same matter.

MR. WALLACE: Now, I want you to keep one thing in mind, Mr. Schwenke, just for your benefit; maybe I'm just speaking for me and not for the other panel members. You mentioned that, of course, the burden of proof is different in a criminal matter, the burden of proof here is lower than there.

There are also some issues that you may want to address that are a little bit different from the criminal matter. In the criminal matter, perhaps, I don't know, but perhaps there were allegations of fraud and that you had to intentionally take the money of a person and knowingly use it for your own purposes, or whatever the elements are.

In this matter, there are allegations that as a lawyer, you may have a duty to very carefully monitor or keep



track of funds, and that theoretically, we could find that you had not carefully monitored and kept track of funds of a client, even though you may not have had criminal intent.

What I'm trying to say is, I want you to

be sure that it's clear in your mind that there are issues different from the criminal matter that you may want to address.

MR. SCHWENKE: Thank you, I--I think I'm aware of that.

MR. WALLACE: Good.

MR. SCHWENKE: I believe what I merely was going to state here are some of the factual issues which was raised by the testimonies.

Number one, I believe a critical issue was that the allegation that I--I forged the signature of Mrs. Sur on two checks; well, I denied that at the criminal case, and I believe that the denial there is also important here. And evidence with respect to that denial, the government put on Mr. Throckmorton, I believe is his name, alleged

expert in the field, to show that the signature were forged.

On the other hand, the evidence that was presented on my behalf, the bank officer corroborated my story that I went and got the--when I received the checks from Colonial Penn, I went to Mrs. Sur and took her with me to the bank to have those checks endorsed and put it in the Schwenke and Udall account. And that's where the--the



proceeds went, and that, I--I believe, even though the assertions continue to come up, I believe there was no--no need for the bank officer to go in there and perjure himself he was there to testify that things exactly happened as I have been asserting all along.

MR. WALLACE: Let me interrupt you just a minute to clear up one thing.

We've Had evidence of--that's been a little confusion, some witness said that it was the Colonial Penn checks which were the ones that were not endorsed and someone else said it was the Western Fire. It's your understanding that the Western Fire were the ones--were clearly endorsed?

MR. SCHWENKE: The--the Western Fire checks were presented to me before we--I met with my client and discuss the settlement, and then had her endorse those.

MR. WALLACE: And those are the ones that she acknowledges she endorsed; is that right?

MR. SCHWENKE: That's correct, yes.

MR. WALLACE: So the disputed ones are

the Colonial Penn checks?

MR. SCHWENKE: The disputed one are Colonial Penn but I--

MR. WALLACE: All right. I just wanted to clear that up.



MR. SCHWENKE: --I understand because I believe I heard Mr. King stated otherwise.

MR. WALLACE: That's--he did.

MR. SCHWENKE: But the Colonial Penn were mailed to our office and upon receipt of those, I again went and got Mrs. Sur to endorse those and we presented those to the bank.

The other circumstance that--other factual--that I believe is relevant here is the disposition of the checks, and my explanation at that--at that trial of what

happened to the check; I'm at a disadvantage here because I don't have that in--that file or the transcript, the transcript is available, I believe Bar Council have the transcript of the trial, but the assertion from my--or despite events, was we agreed to putting all this money into a trucking company that they, Mrs. Sur and Karyn--Mr. and Mrs. Sur had at the time, and--and it was clearly shown that the monies would flow into that trucking company.

The trucking company subsequently went under and at that point, when, you know, when the allegations was brought that the money was used prop--improperly.

The annuity, I believe the evidence is clear, we--we, you know, we made those payments, and the allegations that the

payments came from Colonial Penn, I don't think is substantiated in the--in the trial. The Colon--the--the



payments came from us, Schwenke and Udall, it was our check, issued to them every--every month. So, I--I think the--the charge basically that we mis--we misused the funds and whatnot, it--it's not totally true; however, we--I can't take away the fact that when the trucking company went under and Karyn and her husband no longer have any source of income, we lost everything; they've lost and we've lost because we--we--our portion of the fees that came in, which we believe we made clear at the time of the settlement went into the trucking company.

And that so with the loss of the trucking company that they operated and ran and collected the funds and operate for, like six months, collected a salary for themselves on it, and when it went under, there went their settlement and there also went our portion of the--of the funds that we collected.

If we--and--and again, I think this was in '85, I was admitted in '83, a couple years into and perhaps this was the first major settlement I ever rece--ever--well, it was the major settlement ever received. In visiting with other counsel since then, there's ways that it probably could have been handled, where there would be absolutely no question that the settlement was handled properly.

I would admit to this panel that we probably didn't follow what--what all lawyers would follow in making



those settlements in--in--in making sure theorized absolutely no questions after the fact that there was any problems with the settlement; but as far as the flow of any funds that was used, no funds actually went personally into my account, in fact, I didn't have any personal account, the monies went into Schwenke & Udall account, and if--if--when they were asserting the same claim against Mr. Udall, they were claiming that Udall signed all the checks out of that account, and that's a fact. Seldom I ever see any checks in--in this--or ever signed any checks in the--in the--in the Schwenke &

Udall account.

So, even though I--I have a hard time admitting that there was any fraud, any impropriety, I will for purposes here today, and asking for your--for mitigation, admit that the way lawyers handle the matter was probably where there would be absolutely no complaint after the fact, it's not the way we handled it. We--we--we got involved with the client, wherein the client say, well, you know, the settlement's coming, we've got money coming, we've got this business that we--we were in, we've been in for 20 years, we know we can make all of us a lot of money. Put it in there, we guarantee we're going to make a lot of money for all of us; and the funds was traced penny by penny in that criminal trial, went into that business

and--and then the business went under, and so anyhow, I--I merely want to state that--that that wheeze the case, I had no intention, I know intent is not needed here, but I don't believe that we went out to hurt anybody, or I went out to hurt or cause any grievous harm to this lady. I--I never did. Thank you.

MR. WALLACE: Okay. I have a few questions. One, in addition to the four checks, was it your understanding that the insurance companies had paid approximately $11,179.96 of Mrs. Sur's medical bills? In addition to the four checks.

MR. SCHWENKE: With--with the four checks there, the insurance company was to pay all medicals, all medicals,- and whatever that amounted to.

MR. WALLACE: Up to the time of the settlement.

MR. SCHWENKE: No. Even after the settlement; the insurance company was left to pay all of medicals incurred on the--as a matter of fact, I think her testimony was that after the fact, she went to California, and I believe we were pursuing the further--the further treatment for her, because the insurance company committed to pay all medicals.

MR. WALLACE: Do you have any written document from the insurance company indicating that they would pay all future medicals related to her back?

MR. SCHWENKE: We have settlement agreement

wherein the insurance company agrees to pay all medical expenses incurred, and that settlement agreement is there in the--in the files, either in our file, or they would--the client would have that settlement, because she signed it off.

MR. WALLACE: Okay. What happened to the proceeds of the two Colonial Penn checks? I believe you said they went into the account of Schwenke & Udall; is that correct?

MR. SCHWENKE: I--that's right.

MR. WALLACE: All right. Now, was that a general account or a trust account?

MR. SCHWENKE: I don't recall right now. I-- most likely, it would be the--I don't know, can't say for sure We had two accounts the trust account and the general

account.

MR. WALLACE: Out of that--those two checks, which I believe total 42,000-something--$41,229.76, what-- where did the $41,000 go?

MR. SCHWENKE: If I may refer to the record on the criminal case, 'cause it sets out there. I don't recall exactly offhand how that was--

MR. WALLACE: Did you--did you take any of that for your own fees?

MR. SCHWENKE: I believe there was--I don~t know



for sure right out of that 42,000, but I believe that around that time, there was checks written to me by Mr. Udall off that account.

MR. WALLACE: What was your understanding of your--the fee that you had due as a result of the settlement of the Sur matter?

MR. SCHWENKE: We had a one-third agreement signed; however, we also had a 28~ agreement that is floating around; I don't know exactly what the origin of that, because that was presented by the--them.

MR. WALLACE: So, it was either 28% or 33-1/3.

MR. SCHWENKE: Or 33-1/3. But we do have a 33-1/3 agreement that was admitted, and it was signed by Karyn Sur.

MR. WALLACE: Do I understand your testimony that out of this $41,000 that was put in the Schwenke & Udall account that a portion of that or all of that was paid out

to a trucking company owned or operated by Mrs. Sur?

MR. SCHWENKE: Most of that was paid to the trucking company.

MR. WALLACE: At whose request?

MR. SCHWENKE: Well, we've already had a truck-- we'd already entered an agreement for the trucking company and the agreement--and we've started trucking company and the money was intended, when it arrived, was to go--I mean



for the settlement, was to go into the trucking company.

MR. WALLACE: And you don't know how much of the 41,200 and whatever went into the trucking company?

MR. SCHWENKE: I--I can't state that

right now but the information is there, is available.

MR. WALLACE: And did you have an understanding with Mrs. Sur that an annuity would be purchased to pay her $250 per month for the rest of her life?

MR. SCHWENKE: That's correct. We, at the time of the settlement, when they were in the office, we also had a--somebody from Prudential in the office to sign up on the annuity, which we all expected to cost much less than what it eventually came out to be. I think we--and--going to my memory here, but I think it was--the insurance man proposed the annuity for $28,000, but then a few months later--or not--a few weeks later, he came back with the-- with the documents, and asking for substantially more than

$30,000. And it was that time when Karyn Sur, I believe, was advised that if she wants to continue, we can--we can pay her the money and not buy the annuity, because it was more than what we expected initially. And--

MR. WALLACE: And it's your testimony that she knew then that there was no annuity going to be purchased and that you were just going to make $250 a month payments to her until the money ran out or something like that?



MR. SCHWENKE: I--I cannot say that I--it's my testimony that she knew then, 'cause she was very adamant 3 she did not; but I believe she knew then that we were going to keep--pay her the money out of

Schwenke & Udall.

MR. WALLACE: Why did payments cease after either $4,500 or $6,000 of these $250 a month payments?

MR. SCHWENKE: I don't quite remember exactly what transpired, 'cause I--oh, I believe we had a demand from Mr. Hawkes to pay an extraordinary amount of money; 150,000 or something like that, and from that point, I refused to pay and they then went to the county prosecutor, this matt-- and the criminal prosecution then proceeded.

MR. WALLACE: I'm sorry. I'm kind of speaking out of order. I forgot this should be Mr. Smith's opportunity to ask questions and I would ask a few when he's finished. I'm sorry.

MR. SMITH: That's quite all right,

Counselor.

MR. WALLACE: You go ahead, and if I have others after, we'll ask if any of the panel members have others after, we'll ask them I I'm sorry. You should have gone ahead of us.

MR. SMITH: Well, I just was going to ask him the same questions you were asking, and so we're moving right along.



CROSS-EXAMINATION

BY MR. SMITH:

Q But you do not deny, do you, Mr. Schwenke, that you entered into a stipulation with your former client, Karyn Sur, to settle this matter in the civil case?

A I do deny that I entered this--a

written and signed stipulation.

Q That's your--didn't you admit earlier that that was your signature on that stipulation?

A That's correct, but that was not entered in this case.

Q It was entered--

A If I may explain. When we--I was in Court, we entered a stipulation on the record.

Q I understand.

A Mr. Ring prepared a stipulation, sent it to me, I made--I--the corrections--

Q Okay.

A --sent it back to Mr. King, and never heard of anything more, and apparently, Mr. King submitted the original--

Q Okay.

A --that he submitted to me to the Court, and the Court signed it and entered it.

Q Okay. Regardless of that, you signed the



stipulation; whether it was entered by--as a matter of record in the Court or not, you signed it; is that right?

A That's correct. There is a stipulation that I have signed.

Q And in there you do not--do you not admit that you committed fraud on this lady? Didn't you say the basis of that stipulation settlement was fraud?

A If that's stated on it, that's--that's--on the settlement that I

signed, then that's correct.

Q Okay. That--and you know the definition of fraud; you're an attorney, right?

A That's correct.

Q Okay. So, you've admitted that you defrauded this lady out of thousands of dollars, did you not, when you signed that stipulation? Regardless of whether it was entered into Court, you signed it; right?

A I signed the stipulation, yes.

Q All right. And you have no other documentation. You've known about this hearing, this--this was mailed to your home in Las Vegas; you do live in Las Vegas, don't you?

A No.

Q You don't live at 5233 Holbrook

Drive in Las Vegas, Nevada?

A No, sir.

Q So, if Mr. --oh, the attorney that you used to--



MR. WALLACE: Jamis-

MR. SMITH: Jamis, yeah, Jamis Johnson.

MR. WALLACE: Jamis Johnson.

Q (By Mr. Smith) If he indicated that that was your home of record, and that you told him that's where you lived, that was incorrect? Was he mistaken about that?

A No. I didn't tell Mr. Jamis that that was my home of record.

Q Okay. So, if he told the Bar that, then he was incorrect?

A Well, I don't know what he told the Bar.

Q Okay. And has he always known where you--where you could be located?

A Mr. Johnson knew that I was in Washington, D.C., and on many occasions, also in Western Samoa.

Q And he always had your address?

A Well, he knew I was at--that I could be reached in Washington, D.C. He called me there.

Q Okay. And your former testimony was that he forwarded documents to you from time to time that were sent--mailed to him; is that correct?

A No. No. The-

Q So that's not correct?

MR. WALLACE: Excuse me. I think he hadn't finished his answer.

MR. SMITH: Oh, I'm sorry.

MR. WALLACE: Let him finish his answer before you go to another question.

MR. SCHWENKE: No. My former testimony was that I didn't say Mr. Jamis forwarded anything to me; I said the secretary, when she receives any mail with Schwenke on it, she puts it in a box, and eventually she will put in an envelope and mail it to my ex-wife in Las Vegas.

Q (By Mr. Smith) I see. So, your testimony is that nobody knew where you were, including Mr. Jamison?

A Well, Mr. Jamis knew, and I believe the Bar knew that I was in Washington, D.C.

Q And how--how would the Bar know that? I think you said you never told the

Bar that; right?

A Well, the Bar contacted the Embassy-

Q And--and who-

A --and Samoan Embassy-

MR. WALLACE: You've got to let him finish his answer, Mr. Smith.

MR. SMITH: I'm sorry.

THE WITNESS: The--the Bar contacted the Embassy in Washington, D.C. and made some allegations that were partially false, partially true.

Q (By Mr. Smith) And who--who from the Bar made that contact?



A I--that, I air[ not aware: the name as remembered by the secretary there, he just said to be--remembered the name of

Baldwin, but I don't recall exactly who he was referring to, or where--I-

Q Okay. But you did--just to go back and just to reiterate then. You did sign a document where you admitted that you had defrauded this lady out of at least $80,000; right?

A That document speaks for itself.

MR. SMITH: I have no other questions.

MR. WALLACE: Questions?

MR. TOBLER: No, I have no questions.

MS. WILKINS: I sort of wonder what (inaudible) money. You--the settlement with the insurance companies was $100,000?

MR. SCHWENKE: No. I believe the figure that's accurate is 82,000.

MS. WILKINS: Eighty-two, it (inaudible) So, how much money,

approximately, went into your trucking account?

MR. SCHWENKE: I would say at least 90 percent of all that money?

MS. WILKINS: Ninety percent; so some funds were paid to Mrs. Sur?

MR. SCHWENKE: That's correct.



MS. WILKINS: And that was approximately how much money?

MR. SCHWENKE: If my memory serves me correctly, probably 14, $15,000 direct.

MS. WILKINS: And some went to your personal account?

SCHWENKE: I--I received a check from our office for those months, for salary at that time, and I don't--my normal check from the office was between two and $3,000.

MS. WILKINS: So this was for your attorney fees for the Sur case?

MR. SCHWENKE: That's correct, and I--

MS. WILKINS: And that's all you were paid personally?

MR. SCHWENKE: Not necessarily for the--for the Sur case, this was what I received from our--from our law account during that time, not necessarily having to do with the Sur case, but in--in--every general, that's how much I was compensated for from the--from our law account.

MS. WILKINS: You mean for work done for the trucking company or for--

MR. SCHWENKE: No, no, for what I do for the law firm at that time, for (inaudible) association.

MS. WILKINS: ˜nd the money came out of

the



trucking account?

MR. SCHWENKE: And it's very likely that the check I will receive a month, two months, during that period of time would have come out of the settlement checks that were deposited in the Schwenke-Udall Account for the Sur.

MS. WILKINS: So, did you--were you ever paid your attorney's fee for the Sur case?

MR. SCHWENKE: Well, that's what I alluded to earlier in the way that lawyers should normally handle. We believe we--we got paid, but rather than specifically setting forth the amount of the attorney fees and then setting forth what attorney's fees was then put in-- wherever it went and

wherever the balance of the money went, unfortunately that was--unfortunately that was not done; and if that was done, I don't believe we'd even have any problems. But the totality of all the monies went in--most of it went to the trucking company, a lot of it went directly to Karyn Sur. Personally, I don't believe I received very much, probably--if I attributed two months, the checks for two months that I received from the office for that time, it would be--more than $5,000.

MS. WILKINS: Okay. Well, if 90% of the funds went into the trucking account, then how did you get $5,000 out of your own legal account?



MR. SCHWENKE: I--I don't think I'm

explaining this correctly. I'm saying the money went into the legal account no question, the money the settlement went in there.

MS. WILKINS: All of it?

MR. SCHWENKE: Yeah.

MR. WALLACE: About $83,000?

MR. SCHWENKE: Yeah, about $83,000. And from there, in the criminal case, we were able to trace where the money then go from there to the trucking company and also to the client as--as well, and--and that would show that most--that's where most of the money went.

I'm not saying that there was money directly from there to me, no; I'm saying that at the same time, those monies went into the--to the law account, there was

also--I was also being paid by the law firm, by the law account during those two months or so, and when that money was in that account.

And I'm saying that the monies that I was being paid for by the law--from the law account could very well have been from this--from this settlement money, but it doesn't have to be from this settlement money because there's other--other clients' money going--other fees going into that account as well.

MS. WILKINS: So you're indicating that that



money sat in your legal account for a couple of months at least?

MR. SCHWENKE: Well, it took a while to

finally all--went in to the--went in where it's--where it eventually ended up at, which was the trucking company.

MS. WILKINS: So, how long did the money stay in that account?

MR. SCHWENKE: I'm estimating a couple months.

MS. WILKINS: Two or three or four?

MR. SCHWENKE: Two, yeah, 'cause that, and I would be attributing the fees that I was getting from the law account to some of that funds that was in there.

MS. WILKINS: So, you're saying that you were only paid then $5,000 for the work on the Sur case?

MR. SCHWENKE: Please, I didn't I--I'm

not claiming that I got only 5-,000. I--I'm claiming--

MS. WILKINS: How much were you paid for the Sur case?

MR. SCHWENKE: --that the monies that I got paid for those months, which could very well be from the Sur case is approximately $5,000, $2,500 a month is what I was getting from the law account. And that could very well be from the Sur case; but specifically from the Sur case, no, I did not.

MS. WILKENS: So how did you earn your interest



in the trucking company?

MR. SCHWENKE: Through this settlement; by us helping them set up the trucking company, getting licenses and this type of

thing. Make those--those applications; plus part of our fees, supposed to be part of our fees in the settlement, that when all--went into there from the settlement, what was--is supposed to be our fee money-- excuse me--and some--and that earn-us our interest in the trucking company, and also our working in getting the trucking company going.

MS. WILKINS: What was your share of the trucking company?

MR. SCHWENKE: I believe it was 50%.

MS. WILKINS: Okay.

MR. WALLACE: Anything else?

MS. WILKINS: Nothing further.

MR. WALLACE: Anything else?

MR. TOBLER: I'd like to bring back Mrs. Sur and ask her a few more questions.

MR. WALLACE: Okay. I don't have anything else.

Do you have anything else you'd like to present at this time?

MR. SCHWENKE: I--I think I'm done, unless there's any questions.

MR. WALLACE: All right. Do you rest your case



on--

MR. SCHWENKE: I rest.

MR. WALLACE: All right.

Mr. Smith, do you have any rebuttal?

MR. SMITH: I don't know, yet. If I could have about one minute, I'll let you know.

MR. WALLACE: Fine. We'll wait.

MS. WAlKINS: Can I asked one question?

Let's see, you were--

MR. WALLACE: Are you going to ask it of Mr. Schwenke concerning the--let's wait until Mr. Smith comes back, unless it's just a--not a relevant question, has to do with just--

MS. WILKINS: I was reviewing--

MR. WALLACE: Whether to--

MS. WILKINS: This, not able to practice law--

MR. TOBLER: Suspended.

MR. WALLACE: Suspended.

MR. SCHWENKE: If I may add, when the Counsel returns, I just want to make one (inaudible) one before--

MR. SMITH: Okay. We'll put Mrs. Sur back on the stand just a moment, with your concurrence, and I believe also the panel

indicated they might have a desire to ask the witness some questions.

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KARYN SUR

recalled as a rebuttal witness by and on behalf of the Bar Council in this matter, after having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q And do you recognize that you're still under oath in this matter?

A Yes.

Q Mrs. Sur.

A Okay.

Q Going back to your earlier testimony and the earlier matters that transpired in this case, there was some

testimony to the effect that--that the respondent received some funds that you did not receive; do you recall that?

A Yes.

Q There was some testimony that those funds were placed--

MR. WALLACE: Let me just interrupt you just a minute. It's been called to my attention that Mrs. Sur may be recording these proceedings; is that appropriate, to your knowledge? I don't know one way or the other.

THE WITNESS: I'll just keep it for my own purposes.



MR. TOBLER: I'd prefer that not be the case; you probably--you may be able to get the tape recording of these proceedings, but

these are generally private proceedings that are recorded by the court clerk only.

MRS. SUR: Oh, okay. I'm sorry.

MR. SMITH: I actually don't know the answer to that, sir, whether that's permitted or not.

MR. WALLACE: I don't either.

Okay. Go ahead.

Q (By Mr. Smith) Did you know what the respondent did with those funds that he kept from your settlement?

A Yes. I discovered that he bought him and Bruce Udall a new car, one from Larry H. Miller, and one from another Miller's, there are several car companies called--last name Miller.

Q Don't know.

A Oh, I thought you knew, I'm sorry.

Yeah, what I know, one was from Larry H. Miller and then in a phone conversation, which I taped, I'd asked Schwenke straight out, if he put some of the money into Freight Distributors Trucking Company and he said yes.

Q What was the name of the trucking company?

A Freight Distributors.

Q Okay. So--so the respondent admitted to you that he put some money into a trucking company; right?



A My money, some of my money.

Q From the settlement of your personal injury case?

A Yes.

Q Do you know how much he put into

the trucking company?

A I don't. I didn't find out exactly how much.

Q Okay. And tell me about that trucking company; who owns that trucking company?

A Schwenke and Udall own 50 percent, and they took Warren Kennedy's semi and he had a contract for hauling air freight, he got 25 percent for that. My ex had a brokerage business with $50,000 equity in it, which means monies due him, and that was his part of it that was put in, and he got 25 percent.

Q So, the respondent owned 50% of a trucking company--

A Yes.

Q --that he used your money--

A Yes.

Q --to invest in?

A Yes.

MS. WILKINS: So, was it an ex-husband at the time, or--

WITNESS: No, he was my husband at the time, but I had nothing to do with his brokerage business.



Q (By Mr. Smith) So, did you get any benefit whatsoever from the--from this trucking company?

A No. As a matter of fact, I worked for it for three months and didn't get paid.

Q Did you author--did you authorize the respondent to put this money into the trucking company?

A N

Q And had you known about the money, would you have authorized him to put it in the trucking company?

A No. Especially with me not having any control.

MR. SMITH: Okay. I have no other questions.

MR. WALLACE: Do you have any questions?

MR. TOBLER: Yes.

MR. WALLACE: Go ahead.

MR. TOBLER: Was this arrangement with the trucking company the one where Mr. Schwenke and Mr. Udall owned 50%, was that established prior to your receiving, or prior to your settlement?

THE WITNESS: It was after my settlement.

MR. TOBLER: So, is it fair to say

that--I guess a better would be, would be, how did Mr. Schwenke and Mr. Udall get 50% in this trucking company, if you know?

How did they get 50% ownership? What was the consideration for that?

THE WITNESS: They--let's see, I've got the



paperwork here, let me get my glasses.

This shows where he put in his $58,000, now--not all of this is truthful, but this is Schwenke's letter on the trucking company.

MR. WALLACE: Do you want us to review this letter?

MR. SMITH: I don't know if I've seen it--

THE WITNESS: (Inaudible)

MR. WALLACE: Mr. Schwenke has a right to saw it also, before we look at it.

THE WITNESS: I've got computer printouts, even, from the trucking company--

(Inaudible)

MR. TOBLER: While I'm waiting to see that, I'll ask a couple of unrelated questions.

Did you have any discussion with or. Schwenke on him purchasing an interest in this trucking company?

THE WITNESS: No. My ex-husband talked to him about possibly putting two--Warren Kennedy and Ron together, because he (inaudible) the clients and whatnot I I never discussed it and I have no idea that any of my money was going into it, no.

MR. TOBLER: Okay. How much money, total, did you receive from Mr. Schwenke?

THE WITNESS: What Mr. King said, I got $250 a



for two years, I believe, September, I believe of '87, was the last one, did you keep that one I showed you (inaudible) the last money I'd gotten from the bank that shows it.

MR. TOBLER: I think we have been through this, but I'd like to know specifically.

THE WITNESS: I--

MR. TOBLER: In your--according to your knowledge, how much you received.

THE WITNESS: Exactly a total, I don't know. It was $250 a month from the time of

the settlement until 87.

MR. TOBLER: And I think your attorney stipulated that that was about $6,000; right? Two hundred and-

THE WITNESS: (Inaudible)

MR. TOBLER: Okay. What else, besides the $250 a month?

THE WITNESS: I got $5,000, in L.A., he sent me down there. I don't remember the $6,000, either, the statement was that I felt that I made--

MR. TOBLER: No. I don't know what his statement was, I just want to know how much money--

THE WITNESS: (Inaudible) he gave me the $6,000, it wasn't supposed to be part of my settlement, he would give me part of his settlement--

MR. TOBLER: Oh, an additional $6,000, in addition



to the amount that you received from the annuity?

THE WITNESS: The 5,000 and the 250 a month.

MR. TOBLER: Okay.

THE WITNESS: I thought that was all I was going to get, period.

MR. TOBLER: Okay.

THE WITNESS: And I was supposed to set the $250 a month for life, or by that--by benefactor got 20 years or something like that.

MR. TOBLER: And you discussed that with him, this annuity, proposed annuity?

THE WITNESS: Yeah.

MR. TOBLER: And did he--did he promise to purchase an annuity on your behalf with the monies that you had received from the settlement?

THE WITNESS: Yeah. And he paid me the $250 a month saying that the annuity was going to him in a special account for his clients, and I went to him to get my check every month.

MR. TOBLER: So, you were not aware that in fact no annuity had been purchased?

THE WITNESS: No. Not until '87, when I found out from my bank, that photocopy I gave you, showed that it came out of an account of his, some real estate company. And then I took it to Sam King, and I said, wait a minute,

here, you know, and we started investigating at that point.

MR. TOBLER: So, to your knowledge, that's all the monies you received is approximately $17,000?

THE WITNESS: Yeah.

MR. TOBLER: From Mr. Schwenke?

THE WITNESS: That I can (inaudible)

MR. TOBLER: And you were not privy to any conversation or--or any knowledge about investment of your funds into the trucking company?

THE WITNESS: None other than the phone conversation I had taped that (inaudible) I used it and had transcribed right--came right out and asked him if my money went into Freight Distributors, and he said yes, that it did, but there was no amount.

MR. TOBLER: And that was after the fact?

THE WITNESS: And that was after I discovered that there was no annuity, I went with him to the bank and he had a bond of $25,000 that was my money, as supposed to have been the money for the annuity, we went in to transfer it in my name, and that's when they said, I'm sorry, you defaulted on your loan, we've taken the money back, and I let out a holler, you can't, that's my money, and I guess the whole bank kind of heard me and he couldn't get it reserved, so the annuity money was gone, they took it 'cause of his default on the loan, so he couldn't pay me the 250 a



month any more.

MR. TOBLER: Other than I'd like a chance to 3 review that document, I don't think I have any more questions.

MR. WALLACE: Mr. Smith?

MR. SMITH: I forgot to ask you a couple of questions, if I might, unless you have another question.

Q (By Mr. Smith) Were you present at a--at a proceeding in a civil matter where these checks from Colonial Penn in the amount of $27,847.88 and $13,381.88 were discussed, a prior court proceeding?

A Oh, you mean in which-

Q Were these checks talked about, that you did not sign?

A Oh, yeah.

Q Do you remember that--do you remember that proceeding?

A The other court, and then another one, both of them.

Q Okay

A Civil.

Q All right. Were you there when the respondent was there?

A Paul?

Q Yes.



A Yeah.

Q Do you recall any admissions he may have made regarding those checks, and if so, what were those admissions?

A The admissions, where he admitted forging his name and where he spent the money, I got from the trial transcript, 'cause I was a witness and I had to stay outside during his testimony.

Q I--I see.

A But I read the transcripts that I bought of his testimony afterwards.

Q I see. So you--

A And I was sold by Marty Verhoff that he admitted it.

Q You were not personally present, but you--

MR. SCHWENKE: Object, your Honor. I mean the transcript is obviously what needs to be before the Court--before the panel here.

MR. WALLACE: Mr. Smith?

MR. SMITH: Well, I understand the transcript is the best evidence; however, I've given the respondent a lot of latitude to talk about documents that he hasn't produced, but I--I'll--

MR. WALLACE: Objection--objection sustained.

THE WITNESS: I 've got the transcript. I can go



pick it up and bring it in.

MR. WALLACE: Okay. Objection sustained.

4 MR. SMITH: I have no other questions.

5 MS. WILKINS: I wanted to ask, so you were hearing some discussions about the formation of a trucking company?

THE WITNESS: A little bit. My husband told me about it, that he was talking to Schwenke about putting him and Warren Kennedy together and starting a trucking company, that each one of them got

25% and Schwenke and Udall were to get the other 50, and--

MS. WILKINS: So where--what was your understand in about where your husband's interest would be coming from? Where was your husband earning an interest in the company? How was he going to obtain 25% interest in that company?

THE WITNESS: I don't know, 'cause all he got was a salary.

MS. WILKINS: And you didn't ever question about, how are you going to--to have 25--

THE WITNESS: I--I left that up--

MS. WILKINS: Did you know he was going to have 25% interest in the company?

THE WITNESS: He was--yeah. See, he would get 25% and Warren Kennedy would get

25% when they both put up



these different things, and that Bruce and Paul would have the 50%. And then--

MS. WILKINS: And what would--and what was your husband going to put up?

THE WITNESS: He had a truck brokerage business, Consolidated Transport, and he had $50,000 worth of receivables, people that owed him money, $50,000. He turned that assignment over to them, and I do have checks showing that, that's (inaudible) Master out of Idaho, potatoes, and different places, where they were made out to Consolidated Transport but were cashed by Schwenke and they kept the money.

MS. WILKINS: So that seemed like a reasonable investment on his part?

THE WITNESS: I was going on what my ex (inaudible) his part of it.

MR. WALLACE: Anything else?

Did I understand you to say that some or all of the $250 payments did not come out of the Schwenke-Udall account, but out of a real estate company account?

THE WITNESS: Yeah. It was (inaudible) It was out of a real estate business that he had with some other attorneys. I know I've got it here, I'll find it for you. And that made me question that, and then I got another copy of another check that they'd deposited in my account



and it was under another name. And those, I took to Jim Hawkes and he decided there was something going on.

MR. WALLACE: Did Consolidated Transport have a trucking license?

THE WITNESS: They were licensed as a trucking company, yeah.

MR. WALLACE: Did Freight Distribution make specific application for an additional license, or did they take over the license of Consolidated Transport?

THE WITNESS: Consolidated Transport didn't have a license I it was just a brokerage business my husband worked out of the basement. Now, if you've got a truck and I've got a load of potatoes, he calls you, he puts you in touch with me, he's kind of the middle man, just puts together the deal.

MR. WALLACE: Okay. Did you ever have a conversation with Mr. Schwenke in which he

told you something to the effect of, we have negotiated with Prudential to purchase an annuity, but now Prudential has come back and indicated that the costs are going to be much higher than we originally anticipated? Any conversation along that line that you recall?

THE WITNESS: No. He had me sign some papers from Prudential, or from an insurance company, that I signed and he said that was for my annuity, and it was an insurance,



if the annuity company went out of business that I was guaranteed my 250 a month.

MR. WALLACE: Okay. No--you don't recall any conversations about a different cost or an increased cost or we need to add something to what we thought we'd have to

pay?

THE WITNESS: Not until after I found out at the bank that he had put my money into a bond for himself and put a loan against it. It was all during this time that we discovered, but for two years, I thought it was coming from Prudential

MR. WALLACE: All right. And at the time you-did you see that bond, yourself, or did you just talk to the bank officers about it?

THE WITNESS: I was sitting there when the--the bank officer told him that they--they just took it-

MR. WALLACE: And the reason-

THE WITNESS: --because they defaulted on a loan.

MR. WALLACE: And the reason they took

it was the money was--the bond was in the name of A. Paul Schwenke as opposed to your name?

THE WITNESS: Right. He had mentioned going in there that he was going to put it in my name, that's why I went in with him.

MR. WALLACE: That's all-I have.

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Mr. Schwenke, do you have anything else to ask of this witness MR. SCHWENKE: Yeah. Jus. a couple of questions.

CROSS-EXAMINATION

BY MR. SCHWENKE

Q You--you completely deny being with your husband and Kennedy in my office several times prior to the settlement discussing the--

A Robert Kennedy wouldn't even sit

in the same room with me, Paul, you know that. He wouldn't even come out of (inaudible)

Q Please, just answer my question.

A No.

Q You completely deny ever being present--

A I was never in there with Ron and Karren and you talking about it, no. I might have been in there with Ron (inaudible) you were also the attorney for Consolidated Transport at the time.

Q And you deny sitting in with your husband and Kennedy and me and or. Udall in a meeting on--on starting this Freight Distributor business?

A I had nothing to do with starting it; that was all Ron and you and Warren.

Q Isn't it a fact that you and Ron and Kennedy ran the trucking business? You were there day in-day out?



A Warren was hardly ever there, 'cause he didn't Like my voice, he wouldn't stick around; yes, I did dispatch, but I worked for nothing to help you guys out, get started. Ron was supposed to do the figuring of the tariffs and that.

Q And the salary was collected by Ron, not you?

A Ron got the salary, I didn't get paid. I worked for meals, for lunch.

Q A salary was paid to Ron or you?

A To Ron. Ron got the salary.

Q Oh, there was salary paid then?

A Yeah. Ron got a salary.

Q Okay. - -

A But you didn't tive percentage when you closed the company out for about $196,000--$198,000. Out of the business, he didn't get his 25%, neither did Warren.

Q And the Prudential application that you just stated you signed; isn't it a fact that you signed that at the time that you also came and signed the release, when we talked to finalize the settlement, you signed the release at the--this was prior to us getting any of the funds?

A I don't know the exact date or whether it was the day before or the day after we got the money, because you knew how much.

Q Just if you remember.

A That's awfully hard to remember that far back, because it was either that day that I signed the paper, if we got the settlement first or after.

MR. SCHWENKE: I have no further questions.

THE WITNESS: I think I got the settlement first and then--and we signed the papers later. For the annuity.

MR. WALLACE: Anything else? You may step down.

THE WITNESS: (Inaudible)--tape recorder.

MR. WALLACE: Any other rebuttal?

MR. SMITH: No, sir.

MR. WALLACE: It's up to Mr. Smith. Oh, do you--did you offer the letter?

MR. SMITH: I don't desire to offer it

into evidence unless the respond--

MR. WALLACE: Pardon?

MR SMITH: --unless the respondent wants it in evidence or you want it.

MR. SCHWENKE: I'll offer it into evidence.

MRS. SUR: I--I have to change--

MR. WALLACE: Do you have any objection, Mr. Smith?

MRS. SUR: There's a couple deals in there he told tales about, about saying Ron's--he wasn't Ron's attorney at the time, which he was. And a few other



paragraphs, minor things, but basically, it doesn't explain the composition of the company.

MR. WALLACE: Mr. Smith, do you have

any objection?

MR. SMITH: No.

MR. WALLACE: Could we make copies of that at some appropriate point?

MR. SMITH: Just-

MR. WALLACE: Any other rebuttal, Mr. Smith?

MR. SMITH: No. I was just clarifying; the company is--was eventually liquidated; is that correct?

MRS. SUR: Yeah. Schwenke said there was no more money, close the doors while I had trucks all over the United States, and said I'm sorry.

MR. SMITH: And what--and who--the funds that were there, where did those funds go, as far as you know?

MRS. SUR: According to the computer

printouts that I got on Freight Distributors, there was like $198,000 pulled out of the company and no mention of where it went and he only paid the truck drivers and he didn't pay anybody else.

MR. SMITH: Did he pay or.--your ex-husband any money?

MRS. SUR: Not out of that, no.

MR. SMITH: So, of the $200,000 that there's no



accounting as to what Mr. Schwenke did with that after he liquidated the company?

MRS. SUR: No. Up to that point, the computer printout shows who got paid what and he got counselor fees and all the money--during the three months the truck company was working, where all the money

went; but as to that $198,000, he shows that was closed out, that's when the company was closed and that's what he pulled out of it.

MR. SMITH: Okay. No other questions.

MR. WALLACE: Okay. Mr. Schwenke?

MR. SCHWENKE: I don't have any further questions, but I'd like to--to, you know, to testify in rebuttal.

MR. WALLACE: All right. Any more rebuttal, Mr. Smith?

MR. SMITH: No, sir.

MR. WALLACE: All right. You can step down.

Thank you.

MRS. SUR: (Inaudible)

MR. WALLACE: Do you have any surrebuttal?

MR. SCHWENKE: Yeah, I do.

MR. WALLACE: All reheat. Do you want to go ahead? You're still under oath, Mr. Schwenke, so ahead and testify.

MR SCHWENKE: Okay. Thank you.

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A. PAUL SCHWENKE,

the respondent herein, after having been previously duly sworn, was examined and testified further as follows:

DIRECT TESTIMONY

MR. SCHWENKE: In response to some of the statements made here, the company was shut down due to the fact that we had more outstanding debts than the--the--let me back up. Mr. and Mrs. Sur were running and determining what a load was--what they charged for a load, and--and

sending out a truck to cover a load. And after month--the months, it seems like they kept coming back for more money to the trucking company, more money to the trucking company.

So, one Sunday, I went with a--an accountant that we used at the time, and he went through--to the warehouse where the company was operating, and went through all the books, and discovered that the--that it was costing substantially higher than the income that was generated to send these trucks out.

And then at that point when the decision was made collectively, with--between all of the principals to shut it down, and it was shut down. Efforts to made--subsequent to that, me and Udall also

kind of went apart also efforts were made to collect and pay as much as we could.

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We didn't pay as much--we didn't pay all of the debts outstanding at that point, but we covered pretty much most of the debts outstanding from what was--what could have been collected by both Mr. Udall and myself, to pay for the outstanding debt, and that was the end of the trucking company.

MR. WALLACE: Okay. Anything else?

MR. SCHWENKE: No.

MR.WALLACE: Mr. Smith, do you have any questions?

MR. SMITH: No, just one other comment, though.

I have asked Mrs. Sur to go obtain those documents and I'd like to offer those when

they're available. She just lives about ten minutes away, she says.

MR. WALLACE: Which documents are those?

MR. SMITH: Those are--it's a transcript that she referred to in her testimony wherein she alleges that the respondent admitted to forging of these--the forging of these documents, he's testi--although we have a default in this case where that has been defaulted, he here has admitted that he did not forged--he stated he has not forged those documents, and Mrs.--Mrs. Sur indicates that she has a transcript of a proceeding wherein the respondent admits the forgery, and so by way of rebuttal to that, I think it would be appropriate if I admit those into evidence

when



they're available

MR. WALLACE: Mr Schwenke?

MR. SCHWENKE: Well, although I would like to see the transcript myself, I think it's inappropriate to--to bring that transcript before this Court. I--I wasn't quite clear from the testimony where the transcript of criminal trial, and--

MR. WALLACE: Well, I've heard trans--I've heard transcripts of the criminal trial, and I've heard transcripts of a phone conversation she had with you, and I don't know which of those that she's bringing. Do you know, Mr. Smith?

MR. SMITH: She--she indicated that it was the Court record that she was bringing.

MR. WALLACE: A criminal trial record, a portion of the criminal trial record?

MR. SMITH: I don't know until I see it.

MR. SCHWENKE: Again--

MR. WALLACE: Well, maybe we--

MR. SCHWENKE: This--there was no civil trial. So there's no transcript there. The only transcript that I'm aware of is this transcript of the criminal trial, and I know for a fact there was no such admission in the criminal trial, otherwise, I would have been convicted;
however, I think for purposes of your decision today, I



don't think you do need to look at that. So, on that--

MR. WALLACE: Let--okay, let's--have you--let's-- and I won't rule on that at this time. Let's go ahead and proceed, you've both been given opportunities for a case in chief and rebuttal. At this time, Mr. Smith, we would ask, you have the burden, ask you to go forward in arguing the case, what your recommendations would be and what you think we ought to do, and then we'll have Mr. Schwenke reply to that--respond to that.

If she gets back here with the records, we may take that up and decide whether or not to receive those also.

MR. SMITH: All right. Just once again point out to the Court that we do have a default in this case and that the matters set forth in the formal complaint have been

established as true, and the only matters that I've offered today have been by way of indicating the aggravation to substantiate our claim, which is that the respondent should be disbarred.

And I submit, members of the panel, that if ever a case warranted disbarment, this one does; and if this one doesn't, I--it would be hard to imagine one that doesn't require disbarment.

That we have here an individual who has forged a client's signature to checks, and has stolen money from his client and has cheated her out of thousands of dollars by



settling her case in the manner it was settled. And you've heard the aggravation in that she's testified that she has been

substantially and permanently disabled. That she is suffering these injuries that she cannot get corrected because of her inability to pay for that. That she is now, for the rest of her life, going to have to endure the consequence of the malfeasance of his respondent because of her permanent and physical disabilities, disabilities that she doesn't have the money to correct, disabilities that she could have gotten corrected if she'd had the money that was due her.

That the facts are established that she could have gotten $200,000 had this case been handled correctly, total settlement of which approximately 150,000 would have been hers, and with that much money, she could have been able to go and set the medical

care and treatment that she needed and because of this--of the malfeasance of the respondent, she has suffered that, and is going to suffer substantial permanent injury the rest of her life.

So we heard that--we heard evidence that the respondent admitted that he owes her an additional sum of money, I believe, if memory serves me correctly, that's bearing the respondent's own signature, wherein he states, I owe you this money and I owe you this money because of fraud, because I defrauded you, and he's admitted that he's



defrauded her and therefore owes her that much money.

So, we have the element of fraud, we

have the element of larceny, we have--and we have permanent and serious injuries on the part of this individual who was harmed by this person. We've heard that he took the money that he got, put it into his own business, that he subsequently litigated--liquidated and--and we--although we don't know where that went, we know that it didn't go back to Mr. Sur, and so once again, the respondent has benefitted by his own malfeasance, financially.

And ladies and gentlemen, I'd just simply submit that this case leads to only one conclusion and that is disbarment, and give you the--the standings for imposing lawyer sanctions which you can use as a guide in making your own conclusions, but I submit--(Tape change - some proceedings not

recorded.)

MR. WALLACE: --the insurance companies were willing to settle for $200,000 and in that regard, I'll ask two or three questions and just let you respond.

I'm--I'm--pretty much in my own mind set, but I imagine there are a lot of cases where an insurance company has a case reserved for a certain amount of money and would be willing to pay out a certain amount of money and then settle it for half of that value because of the actions of a attorney. Let's assume an attorney isn't the best personal

injury lawyer and doesn't prosecute a case well and maybe settles a case for 50% of what another attorney may be able to settle a case for. You don't believe that that violates the rules of discipline of the Bar, do you?

MR. SMITH: Because they have--they have a difference in judgment?

MR. WALLACE: Yes.

MR. SMITH: No. I don't. But I don't think that's the evidence in this case. The evidence in this case is, that's established by the default, is that this case, that the insurance companies prepared to settle this for their policy limits of $100,000, and that they--that

they responded, in his eagerness to settle this case and grab what he could, didn't

pursue that settlement, although they were willing to do that.

MR. WALLACE: But there's no evidence that he knew they were willing to do that. This is something that's come to light after the fact that the case was reserved for a higher amount, or that there may be more monies available, and that had he been a better lawyer or worked harder, or pushed harder--

MR. SMITH: No.

MR. WALLACE: --he may have gotten more money for his client.

MR. SMITH: No. I think the allegation is that



he knew that, that's--at least that's what's changed in the formal complaint and that was

what he--that the knowledge was there.

MR. WALLACE: All right. Okay. Let's look at that a moment, 'cause I think--this is one issue I'd like to resolve.

My understanding is there's an allegation that the company was aware--the companies were ready to pay $200,000 but not that he necessarily knew that was the case.

MR. SMITH: Well. let's see.

MR. WALLACE: Paragraph 7.

Oh, Paragraph 11 is the one I'm thinking of. Documents submitted in the Third District Court indicate that both insurers were going to pay their entire limits totaling $200,000 due to the severe disabling injury by the plaintiff, et cetera. I don't think there's an indication that he was aware of that prior to the

settlement.

MR. SMITH: Other than if you look in--in Paragraph 29, the fee he took was actually equivalent to 20 that, which-

MR. WALLACE: Right. I did notice that.

MR. SMITH: --which means that he must have had some idea of how much his fee would have been, so I submit that he knew.

MR. WALLACE: Okay.



MR. SMITH: And that he stipulated to that judgment based upon his knowledge of what the case wheeze worth.

MR. WALLACE: All right. Mr. Schwenke, your response?

MR. SCHWENKE: I think the--with respect to the statement, the argument just

FILED

(3) 93-2089 APR 18 1994

No._____

OFFICE OF THE CLERK

**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1993

---

A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO
THE UTAH SUPREME COURT.

---

# PETITION FOR A WRIT OF CERTIORARI

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Petitioner

**VOLUME THREE**

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BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

Hearing Panel:
Robert Wallace, Chair
E. Gregg Tobler
Sandra Wilkins

In The Matter of the
Complaint by

RON AND CAREN SERR

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION
OF DISCIPLINE

against

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83
)

This matter came on for a Sanctions Hearing pursuant to notice on March 2, 1992, before a Disciplinary Hearing Panel of the Ethics and Discipline Committee of the Utah State Bar. The Office of Bar Counsel was represented by Wendell K. Smith, Assistant Bar Counsel, and the Respondent was

represented himself. The Hearing Panel having heard testimony from Caren Serr and Samuel King, the arguments of Counsel, and being otherwise fully advised in the premises, and pursuant to Rule XII(e) of the Procedures of Discipline of the Utah State Bar hereby enters Findings, Conclusions, and Recommendations as follows:

FINDINGS OF FACT

1. At all times herein the Respondent A. Paul Schwenke was an attorney licensed to practice law in the State of Utah.

2. In June, 1985, the Respondent, and his associate Bruce J. Udall, entered into a contract with the Complainant, Caren Serr, to represent her in the recovery of damages for injuries she sustained in an automobile accident on November 16, 1983. The contract

provided that the Respondent and his associate were entitled to an attorney fee of 28% of any recovery.

3. The subject accident involved two cars colliding at an intersection, one driven by a party named Collard and insured by Western Fire, and the other driven by a party named Whitehead and insured by Colonial Penn. Total policy limits were $200,000.00. It appeared that both Collard and Whitehead were at fault in the original collision and that the Complainant was without fault in that subsequent to the initial collision their vehicles struck her vehicle.

4. On September 23, 1985, Schwenke settled the Complainant's claim against Whitehead and Collard. In negotiating the

settlement, advising her to accept the settlement, and collecting and disbursing settlement proceeds the Respondent Schwenke was the lead attorney, taking all steps and making all representations necessary to effectuate the settlement, with his associate Bruce J. Udall being more or less passive.

5. Respondent advised the Complainant that the most he could obtain for her was a $26,763.75 cash payment with which he would purchase from an insurance company an annuity that would provide her with a $250 a month payment for her life. The defendants' insurers would also pay her outstanding medical bills of $11,179.96 and her attorney fees.

6. Complainant reasonably relied on the

advice given her by Schwenke and accepted this offer and signed the settlement documents.

7. On or about September 23, 1985, Complainant endorsed a check issued by Western Fire for $27,847.88, as well as a second check also from Western Fire for an additional $13,381.88. The Respondent advised her that these checks represented the monies to purchase the annuity and to pay the balance due on her medical bills.

8. Respondent never purchased the annuity, but rather purchased a bond in his own name. The bond was eventually foreclosed upon as a result of Respondent's personal debt.

9. Over the next two years, Schwenke sporadically paid Complainant from his own

monies a sum Of $250 a month for a total of $4,500.00 representing to the Complainant that he was in fact forwarding to her the insurance annuity checks. Complainant has not received any $250.00 payments since sometime in 1987.

10. The Complainant has no annuity and has been irreparably harmed thereby.

11. Complainant relied on Schwenke's statements that he would obtain the annuity when the settlement was made and that he had obtained the annuity.

12. On or about September 25, 1985, Colonial Penn delivered two checks to defendant Schwenke for the identical sums that Western Fire issued, to wit, $27,847.88 and a separate check for $13,381.88. Schwenke failed to advise Complainant about

these funds.

13. Schwenke deposited the checks into his own account in his own name and either forged or caused to have forged Complainant~s signature on both checks.

14. The actual money that Complainant received from the settlement was the $4,500.00 paid to her under the pretense of an annuity over a two-year period, and $11,310 in cash at the time of settlement, for a total of $15,810.

15. Total cash paid by the insurers was $82,359.52. In addition, the insurers paid Complainant's medical expenses of $11,179.96; for a total benefit to Complainant, if properly disbursed, of $93,539.48.

16. The maximum fee Respondent and his

associate Udall would have been entitled to was $26,191.05, that is, 28% of $93,539.48.

17. Respondent Schwenke actually received $65,049.52.

18. In a Stipulation of September 19, 1989, entered in the Third District Court case of Serr vs. Schwenke and Bruce Udall, Civil No. 88-01441, Schwenke confessed to a judgment in fraud, not dischargeable in bankruptcy in the sum of $100,000, less credits for cash Respondent paid her after September 19, 1989, and the proceeds from two parcels of land, one in Weber County, Utah, and the other in Duchesne County, Utah which according to the terms of the Stipulation were to be deeded to the Complainant.

19. Subsequent to the Stipulation,

Schwenke paid $250 in cash, did not convey the Weber County property, but did convey the Duchesne County property valued at $2,500.

20. The Stipulation provided that the findings of this judgment were to state fraud with particularity for the purpose of avoiding a bankruptcy discharge of the judgment by Schwenke.

21. At the time Schwenke settled Complainant's case, he was in bankruptcy.

22. The $100,000 stipulated judgment entered by the Third District Court in Serr vs. Schwenke and Udall, was based upon fraud which included damages for the loss of the money necessary for Caren Serr to have the needed rehabilitative surgery, for money converted by Respondent which was paid by

the insurers for the loss of her future earnings, emotional distress, punitive damages, costs and attorneys' fees.

23. On or about August 11, 1987, Complainant filed the original letter of complaint with the Office of Bar Counsel.

24. The Formal Complaint in this action was served on Respondent on December 4, 1990, by mailing a copy thereof to Respondent by certified mail to his last known address as shown by the official roster of attorneys of the Bar.

25. Notice of Intent to Default was served on Respondent on January 11, 1991 by mailing a copy thereof to Respondent by certified mail to his last known address as shown by the official roster of attorneys of the Bar.

26. Default was entered against Respondent by the Executive Director of the Utah State Bar on March 19, 1991. A copy thereof was sent to Respondent by certified mail to his last known address as shown by the official roster of attorneys of the Bar.

27. Respondent's last know address as shown on the official roster of Attorneys of the Utah State Bar at the time of service of the Formal Complaint, Notice of Intent to Default and Default entered herein was 165 South West Temple, #300, Salt Lake City, UT 84010 and is the last address Respondent has provided to the Utah State Bar.

28. The Office of Bar Counsel of the Utah State Bar attempted to locate the actual whereabouts of Respondent and having been informed by Respondent's former

associate that he was living at 5233 Holbrook Drive, Las Vegas, NV 89103 mailed the Notice of Hearing pertaining to this Sanctions Hearing to that address. Respondent appeared at the Hearing.

29. Respondent is currently residing at 106 magic Drive, Murray, UT 84107-8209 and has informed the Hearing Panel he will be residing there pending the resolution of other legal proceedings currently pending against him in the State of Utah.

Based on the above Findings, the Panel makes the following:

## CONCLUSIONS OF LAW

1. Respondent was duly and properly served with the Formal Complaint in the above-entitled action in accordance with the provisions of Rule XI(b) of the Procedures of Discipline of the Utah State Bar. Default on the Formal Complaint was properly taken and judgment properly entered against Respondent by the Executive Director of the Utah State Bar.

2. Respondent has violated the following Rules of Professional Conduct as approved by the Utah Supreme Court on 2/19/71:

A) Canon 1, DR 1-102 MISCONDUCT

A) A lawyer shall not:

3) Engage in illegal conduct

involving moral turpitude; and/or

4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and/or

6) Engage in any other conduct that adversely reflects on his fitness to practice law.

B) Canon 1, DR 9-102 PRESERVING IDENTITY OF FUNDS AND PROPERTY OF CLIENT:

B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties and/or

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of a lawyer and

render appropriate accounts to his client regarding them and/or

(4) Promptly pay or delivery to the client as requested by a client, the funds, securities, or other properties in the possession of a lawyer which a client is entitled to receive.

Based on the above conclusions, the Panel makes the following:

## RECOMMENDATION

The Hearing Panel in making its recommendation relies upon the following factors in aggravation and mitigation:

Aggravation:

1. Respondent's prior disciplinary record in Formal Complaint F-241 wherein he

agreed to represent his clients in the placement of Samoan children in the United States. After receiving fees in the amount of $5,000.00 per child, for five children, he failed to provide the agreed legal services in at least two of the adoptions requiring his clients to expend additional sums to complete the adoptions themselves. In substance he occupies for which no meaningful legal services were performed. This conduct violated Cannon 2, DR 2-106(A) currently Rule 8.4, MISCONDUCT, of the Rules of Professional Conduct of the Utah State Bar. On May 18, 1990, the Supreme Court suspended Respondent from the practice of Law for 30 days and required that he make restitution to his clients in the sum of $1,200.00. A copy of Findings, Conclusions

and Recommendations of the Hearing Panel and the Order of Discipline are attached hereto as Exhibit A and incorporated herein by reference.

2. Respondent's prior disciplinary record in F-281 wherein Respondent purchased certain real property on or about March 24, 1986 and on that same day filed a Chapter 11 Bankruptcy Petition on behalf of the seller of the property. Subsequent to filing the Bankruptcy, Respondent caused the seller to deed the property to his own wife and thereafter at the Bankruptcy proceedings misrepresented to the Court that he did not own any interest in the real property. Respondent's conduct violated Cannon 1, DR 1-102(A)(4), currently Rule 8.4(c), MISCONDUCT, Cannon 1 DR 1-102(A)(5),

currently Rule 8.4(d), MISCONDUCT, Cannon 5, DR 5 -101(A), currently Rule 1.7, CONFLICT OF INTEREST, Cannon 5, DR. (A), currently Rule 1.8, CONFLICT OF INTEREST, Cannon 7-102(A)(3), currently Rule 3.1, MERITORIOUS CLAIMS AND CONTENTIONS, Cannon 7, DR 7-102(A)(5), currently 3.1, MERITORIOUS CLAIMS AND CONTENTIONS, and Cannon 7, DR 7-102(A)(7), currently Rule 3.1, MERITORIOUS CLAIMS AND CONTENTIONS of the Rules of Professional Conduct of the Utah State Bar. On March 21, 1991 the Supreme Court suspended Respondent from the practice of law for a period of one year. A copy of the Findings, Conclusions and Recommendations of the Hearing Panel and the Order of Discipline are attached hereto as Exhibit B and incorporated herein by reference.

3. The actions of Respondent were improper. Such actions include, taking money due *his client*, Caren Serr, and using it for his personal use to the substantial detriment of his client, keeping from his client the truth concerning the actual amount of settlement, failing to purchase an annuity for his client as agreed by him, luring his client into believing that such an annuity had been purchased by telling her so and by periodically paying her $250.00. .

4. The Panel recognizes that acts currently as issue preceded the prior disciplinary proceeding, but such conduct still shows a pattern of improper conduct. The pattern of misconduct exhibited by Respondent in this matter and in F which indicate his propensity to dishonestly take

his client~s property for his personal use and benefit.

5. Respondent's refusal to acknowledge the wrongful nature of his misconduct.

6. The vulnerability of Respondent's client who was the victim of his misconduct and who is now permanently disabled because she does not have the funds to obtain corrective surgery. Funds she would have had if they had not been taken by Respondent.

Mitigation: Relatively young inexperienced lawyer.

Based on the foregoing, the Hearing Panel, recommends the following discipline:

1. Disbarment.

2. Respondent shall pay the reasonable costs incurred to the Office of Bar Counsel for prosecuting this action in

the amount of $323.76.

3. Respondent shall make full restitution to Caren Serr in the amount of $97,250.00, plus interest thereon at the rate of 12% per annum from the date of November 5, 1990, as a condition precedent to readmission to the Bar. This is the amount he agreed to pay Mrs. Serr in the stipulated judgment in a collateral civil matter between the parties filed in the Third Judicial District Court, Civil Case No. 88-01441.

4. In the event any claims are paid by the Client Security Fund, due to Respondent's professional misconduct in this or any other matter, restitution to the Client Security Fund shall also be made in full as a condition precedent to readmission to the Bar.

5. It is further recommended that the Order of Discipline prohibit Respondent, upon the effective date of his disbarment, from maintaining a presence in or occupying an office where the practice of law is conducted, that he be directed to take such actions necessary to cause the removal of any indicia as an FINDINGS, counselor at law, legal assistant, paralegal, law clerk or similar title, and in all other respects refrain from acting in any such capacities.

DATED this day of ,

1992.

DISCIPLINARY

HEARING PANEL

By:_____

Robert

Wallace, Chair

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Findings, Conclusions and Recommendation was mailed certified mail return receipt requested, postal certificate number P 879 345 419, to A. Paul Schwenke, Attorney at Law at 106 Magic Drive, Murray, UT 84107-8209 on this _____day of _____, 1992.

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR
Disciplinary Hearing Panel:
Robert Wallace, Chair
E. Gregg Tobler
Sandra Wilkins

| | |
|---|---|
| In the Matter of the Complaint by | ORDER AFFIRMING FINDINGS OF FACT CONCLUSIONS OF LAW AND |
| RON AND CAREN SERR | RECOMMENDATION OF DISCIPLINE |
| against | |
| | F-322 |
| A. PAUL SCHWENKE<br>DOB: 10-12-51<br>ADM: 05-09-83 | |

Pursuant to Rule XII(e) of the Procedures of Discipline, the Board has reviewed the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Disciplinary Hearing Panel. It hereby affirms those determinations, adopts them as its own, and incorporates them by reference into this order.

Dated this 4th day of May, 1992.

BOARD OF BAR COMMISSIONERS

By_____
James Z. Davis
President

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order was mailed to A. Paul Schwenke Attorney at Law at 106 Magic Drive, Murray, UT 84107-8209 on this 11th day of May, 1992.

_____

BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR.

In the Matter of the Complaint
by RON AND CAREN SERR,

against

MOTION FOR
RECONSIDERATION

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

Case Number F-322

Respondent.

Respondent, A. Paul Schwenke, pursuant to Rule VII(f), Procedures o~ Discipline of the Utah State Bar, respectfully requests a reconsideration of the Findings of Fact, Conclusions of Law, and Recommendation of Discipline, submitted to the Board in the above captioned matter. The reasons for reconsideration, legal arguments in support of modification, and proposed modification will be set out fully in a supporting memorandum of law to be timely filed for

consideration by the Board in its next meeting.

Petitioner requests oral argument.

Dated this 5 day of May, 1992.

_____

A. Paul Schwenke

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a copy of the foregoing request for reconsideration to or. Wendell K. Smith, Assistant bar Counsel, 645 South 200 East, Salt Lake City, Utah this 5 day of May, 1992.

_____

A. Paul Schwenke

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of the Complaint

by RON AND CAREN SERR,
against
A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83
Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION FOR RECONSIDERATION

Case Number F-322

Respondent, A. Paul Schwenke, respectfully submits this Memorandum of Points and Authorities in support of Respondent's's Motion for Reconsideration of the Hearing Panel's proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline.

## PRELIMINARY STATEMENT

The respondent was not served with the

Summons and Complaint. The respondent was not served with any of the pleadings subsequent to the alleged service of the summons and complaint. Accordingly, the respondent did not receive actual notice of any of the proceedings in this matter except for the Notice of Sanctions Hearing set for March 2, 1992.

The respondent appeared at the March 2, 1992, sanctions hearing and objected to the deficient service of process and lack of actual notice to the respondent. The Hearing Panel (hereafter referred to as "Panel") denied respondent's objection on the basis that the service met the requirements of Rule XI(b), Procedures of Discipline of the Utah State Bar (hereafter referred to as "Procedures of

Discipline").[1] The Panel refused to consider whether or not the service of process violated respondent's due process rights.[2]

The respondent will demonstrate, conclusively, in this memorandum that his due process rights were denied or violated in the proceedings leading up to the proposed Findings, Conclusions and Recommendation now before the Board of Bar Commissioners (hereafter referred to as

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1. Please note under Argument, Point One (2), infra., the Panel's conclusion that the service of process comports with RuleXI(b) of the Procedures of Discipline was clearly wrong.

2. It is clear and plain error if the Commission, likewise, fails to consider the apparent violations of respondent's due process rights. Therefore, the petitioner urges the commission to closely and carefully consider the petitioner's argument on the violation accordingly.

"Commission").

STATEMENT OF RELEVANT FACTS.

1. The respondent's address in the official roster of attorneys of the Bar is P.O. Box 578S3, Murray, Utah, 84107. The respondent, although, absent from the State during all relevant times herein, maintained said post office box address until March 27, 1992.[3]

2. The mailing certificate of the summons and complaint in the above captioned matter shows that said pleadings were served by certified mail on December 6, 1990, upon a Norma Davis, at 165 South West Temple,

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3. Please see the original affidavit of respondent, paragraph 7. The affidavit of is attached hereto as Exhibit #1, and incorporated herein by reference.

Suite 300, Salt Lake City, Utah 84101.[4]

3. The respondent do not know a Norma Davis. Norma Davis was never an agent of the respondent nor was she ever authorized to accept service of process on respondent's behalf.[5]

4. The Utah State Bar was advised in writing on March 27, 1991 of respondent's absence from the State of Utah.[6]

5. The respondent has been in and out

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4. Please see a true and exact copy of said certificate and the return receipt showing that the pleadings were allegedly received by a Norma Davis, attached hereto as Exhibit #2, and incorporated herein by this reference.

5. Petitioner's affidavit, paragraph 5. Please also see the affidavit of Jamis M. Johnson, a true and exact copy is attached hereto as Exhibit #3, and incorporated herein by this reference.

6. Johnson affidavit, paragraph 4.

of the State of Utah since December, 1991, and has re-established a resident in the State on April 16, 1992.

## ARGUMENT

### Point One

### THE PROCEDURE LEADING UP TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DISCIPLINE IN THIS MATTER VIOLATED RESPONDENT' RIGHTS TO DUE PROCESS.

The service of the summons and complaint must comport with the requirements of due process. Otherwise, any orders or judgments, that flow from or resulted from proceedings commenced by a de~defective service of the summons and complaint, are null and void.[7] The service of the summons

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7. W. S. G. Co. v. Redevelopment, 802 P. 2d 755, 765 (Utah App. 1990) citing

and complaint here is defective in at least two respects. The service of the summons and complaint was, (1) not reasonably calculated to apprise the respondent, and (2) the service of the summons and complaint was not made pursuant to rule XI(b), Procedures of Discipline.

(1). The service of the summons and complaint was not reasonably calculated to apiaries the respondent.

Due process at a minimum requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

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Murray City Redevelopment, 598 P. 2d 1352, 1356 (Okla. 1985).

objections."[8] The supreme court has construed the "under the circumstance" language to "embody the idea that plaintiff must act diligently and take reasonable steps in attempting to give the defendant actual notice of the proceeding as are reasonably practicable."[9] "Diligence" means "that 'all reasonable means ... have been exhausted' in trying to determine whether a defendant is a nonresident or a departed resident and what the defendant's last known

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8. Mulane v. Central Hanover Bank, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L.Ed. 865 (1950). Followed in Carlson v. Boss, 740 P.2d 1269 (Utah 1987); Copper State Thrift and Laon v. Bruno, 735 P.2d 387 (Utah App. 1987); Guenther v. Guenther, 749 P.2d 628 (Utah 1988); W. & G. Co. v. Redevelopment Agency, supra at 761.

9. Carlson v. Bos, 740 P. 2d 1269, 1275 (Utah 1987).

address is.[10]

"'Last known address'" means the last known address as far as it is reasonably possible to ascertain it".[11] "Under rare circumstances this may be the address last known to the plaintiff, but normally it would be 'the address of the defendant so far as it is known, that is, by those who under ordinary circumstance of life would know it.'"[12] The supreme court also offered some examples of efforts that could be taken by the plaintiff, or Bar Counsel here, to

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10. Carlson v. Bos, supra, at 1280, citing Kintigh v. Elliott, 570 P. 2d 659, 662 (Or. 1977); Ter Har v. Backus, 487 P2d 660, 662 (Or. 1971).

11. Id. citing Medeiros v. Kaye, 331 A.2d 351, 352, (Conn. 1974).

12. Id. citing D'Occhio v. Connecticut Real Estate Commission, 455 A.2d 833, 838 (Conn. 1983).

ascertain the defendant~s (respondent here) last known address.

This may require a plaintiff to

> make an investigation. .For example, a plaintiff might make inquiry at the post office for the address last known to the plaintiff or inquire with the defendant's last known employer, or with public utility companies in the area of the defendant's address last known to the plaintiff, of defendant's neighbors in the area of the address last known to the plaintiff, and the defendant's friends and relatives.[13]

Against the constitutional requirements of Mullane and as clarified by the supreme court in Carlson v. Bos, the service of the summons and complaint here is totally inadequate and thus violative of respondent's due process rights under

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13. Id.

the Utah Constitution and under the 14th Amendment to the United States Constitution.

Bar counsel simply mailed a copy of the summons and complaint to an address known to Bar Counsel, without any inquiry to see if that address was the respondent's last known address. A simple telephone call by Bar Counsel would have revealed that respondent had not had an office at said address since November, 1990.

Bar Counsel was put on notice after he received the certified mail return receipt which showed that the summons and complaint was not received by the respondent, but instead, was received by a Norma Davis. A simple inquiry would have revealed that Norma Davis was a temporary receptionist,

filling in for the regular receptionist at an office complex shared by several businesses, both lawyers and non lawyers. That Norma Davis worked for the landlord and not for anyone of the tenants. That Norma Davis was at no time, an agent for the respondent. That Norma Davis certainly was not authorized to accept service of process on behalf of the respondent.

Finally, and in addition to the certified mail receipt which put Bar Counsel on notice that the respondent did not receive the copy of the summons and complaint, Bar Counsel was also advise by affidavit on March 27, 1991, that the respondent was out of the State and the respondent had not had an office at the address where the summons and complaint was

allegedly served during the time of the alleged service. It seems that the diligence required for due process imposed a duty upon Bar Counsel to do more after acquiring actual knowledge of the absence of the respondent from the State and particularly the absence of the respondent from the address upon which the summons and complaint was served, at the time of the alleged service. Bar Counsel did no more, but simply send all pleading and notices to the same former office address of the respondent.

Accordingly, the service of the summons and complaint was not reasonably calculated under the circumstances to apprize respondent of the proceedings. The respondent was accordingly not apprized of

the proceedings against him. The respondent's due process rights have been denied or violated and the Commission must take corrective measures; including, dismissing the proposed Findings of Fact, Conclusions of Law and recommendation of Discipline, vacating the default entered against the respondent and ordering Bar Counsel to effectuate adequate and proper service of the summons and complaint herein.

(2). The service of the summons and complaint was not made pursuant to rule XI(b). of the Procedures of Discipline.

Additionally, if the rules prescribed a manner of service of process, than the Commission must substantially comply with

such method .[14] Rule XI(b), Procedures of Discipline requires, in part, that,

> Bar counsel shall cause to be served upon the attorney... a copy of the Formal Committee Complaint and a summons,... ...Service shall be made personally upon the attorney in question or by registered or certified mail to the last known address as shown by the official roster of attorneys of the Bar. (Emphasis added).

The rule specifically requires that the summons and complaint must be served upon the attorney and no one else. Please note that the language of the rule is not permissive. The rule clearly contemplates giving the attorney actual notice of the proceedings against him either by personal service or by the attorney actually

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14. Van Nort v. Davis, 800 p.2d 1082, 1084 (Okl. App. 1990).

receiving the summons and complaint through the mail and personally signing a return receipt that he received the same.[15]

Bar counsel failed to comply with the mandate of Rule XI(b) in the following particulars: (1) Bar Counsel failed to serve the summons and complaint upon respondent on the respondent by personal service. 2) Bar Counsel failed to serve the summons and complaint upon respondent by registered or certified mail but instead served the summons and complaint upon a Norma Davis. (2) Bar Counsel failed to

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15. If someone other than the attorney signs the return receipt, than the service must fail because it has not been served upon the attorney as mandated by the rule. It is a different matter, however, if the person that signed the return receipt was specifically authorized by the attorney to accept service of process on his behalf. But, that is not the situation here.

serve the summons and complaint upon the respondent by registered or certified mail to the respondent's address as shown on the roster of attorneys of the Bar. The panel's failure to follow a prescribed manner of service makes the process fatally defective.[16]

The service of the summons and complaint was not made pursuant to the prescribed manner set forth under Rule XI(b), Procedures of Discipline. If Bar Counsel had followed Rule XI(b), respondent would have been apprized of the proceedings against him. Bar Counsel's failure to comply with Rule XI(b) denied the respondent his right to be apprized of the proceedings

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16. VanNort v. Davis, supra.

against him. The respondent's due process rights have been denied or violated and the Commission must take corrective measures; including, dismissing the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline, vacating the default entered against the respondent and ordering Bar Counsel to effectuate adequate and proper service of the summons and complaint herein.

POINT TWO

THE SANCTION OF DISBARMENT IS INAPPROPRIATE UNDER THE CIRCUMSTANCES AND DISCRIMINATORY.

The proposed sanctions of disbarment is totally inappropriate and tantamount to disparate treatment in light of the Commission's disciplinary recommendation in another related matter involving the same

transaction. Mr. Bruce J. Udall was respondent~s partner at the time of the alleged violation of the Code of Professional Responsibility.

Mr. Bruce J. Udall was charged under the same facts and arising from the same transaction that the respondent is being presently charged.[17] Bar Counsel resolved Mr. Bruce J. Udall's matter by stipulation to a two year probation.[18] Even the complainant charged Mr. Bruce J. Udall with greater misconduct than respondent[19] and yet

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17. Ron & Caren Serr v. Udall, F-382

18. In re Bruce Udall, supreme Court docket no. 910264

19. Please see a true and exact copy of a November 5, 1987 letter from Ron Serr to Christine Burdick attached hereto as Exhibit #4, and incorporated herein by this reference.

Bar Counsel stipulated to probation while pursuing disbarment against the respondent. The only difference between the facts of Mr. Bruce J. Udall's complaint and the respondent's complaint is the color of their skin. Perhaps if the respondent had white skin, he may have also gotten a stipulation to a two year probation.

Additionally, the respondent was criminal prosecuted for a second degree felony as a result if the same facts and circumstances involved here. If the respondent was convicted, disbarment would have been the resulting disciplinary sanction. It seems to the respondent that a unanimous exoneration by a jury must merit something less than the sanction for a conviction.

## CONCLUSION

The service of the summons and complaint was not reasonably calculated, under the circumstances, to apprize the respondent of the proceedings against him. The respondent was accordingly not apprized. The applicable rule contemplates that the respondent receive actual notice of the proceedings against him. Bar Counsel failed to comply with the applicable rule, and accordingly, respondent did not receive actual notice of the proceedings against him.

Respondent's due process rights have been denied or violated throughout the proceedings in this matter, and the respondent is entitled to have the proposed Findings of Fact, Conclusions of Law

and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the summons and complaint upon the respondent.

Additionally, the proposed sanction of disbarment is racially discriminatory and inappropriate given that the respondent was not convicted.

Dated this 19th day of May, 1992.

_____

A. Paul Schwenke

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a copy of the foregoing Memorandum of points and authorities in support of the Request for Reconsideration to Mr. Wendell R. Smith, Assistant Bar Counsel, 645 South 200 East, Salt Lake City, Utah this 19th day of May, 1992.

_____

A. Paul Schwenke

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of the Complaint
by RON AND CAREN SERR,

AFFIDAVIT OF A. PAUL SCHWENKE IN SUPPORT OF THE MOTION FOR RECONSIDERATION

against

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

Respondent, Case No. F-322

I, A. Paul Schwenke, after first being duly sworn, deposed says as follows:

1. I am the Respondent herein.

2. I have personal knowledge of the facts stated herein.

3. In or about October, 1990, I started exploring the possibility of developing my real properties in the Nation of Western Samoa. In or about December, 1990, I discovered a potential source of investment funds from an organization called

OPIC (Overseas Private Investment Corporation) out of Washington D. C. I contacted the Samoan Embassy in Washington D.C. and the Ambassador offered to help me with my project. The Ambassador also offered his home where I stayed most of the time that I was in Washington D.C.

4. I had no affiliation with the office complex at 165 South West Temple after I moved out in November 1990, other than checking in occasionally for my mail.

5. I do not know a Norma Davies, nor was she ever authorized by me to receive my mail or be my agent for service of any type of process.

6. That I have been in and out of the State since the end of December, 1991, and I re-established a residence in Murray, Utah

on April 15, 1992.

7. That my address on the official roster of attorneys of the Bar is P.O. Box 57853, Murray, Utah 84107. I had kept said address during my absence and up until March 27, 1992.

DATED this 19th day of May, 1992.

_____

A. Paul Schwenke, Affiant

Affiant appeared personally before me and stated to me that he has personal knowledge of the facts herein stated and he know the facts are true.

SUBSCRIBED AND SWORN TO BEFORE ME this ____ day of May, 1992.

_____

Notary Public residing in
Salt Lake County

My Commission Expires:

_____

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered, a true and exact copy of the foregoing affidavit of A. Paul Schwenke to the office of Bar Counsel at the address below, on this ____ day of May, 1992:

Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111

_____

IN THE SUPREME COURT
OF THE STATE OF UTAH

In the matter of the Complaint
by KIRK HEATON,
AFFIDAVIT OF JAMIS M.
JOHNSON IN SUPPORT OF
against PETITION FOR AN
EXTRAORDINARY WRIT.
A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83 Case No. 910095
Petitioner, Case No. F-281

vs.

Utah State Bar,

Respondent

I, Jamis M. Johnson, after first being duly sworn, deposed says as follows:

1. I am an attorney duly licensed in the State of Utah and I am familiar with, and have personal knowledge of, the facts and circumstances set forth herein.

2. Mr. A. Paul Schwenke subleased two offices from me late 1989 to November, 1990.

3. I know that, even though, Mr. Schwenke, moved out of the offices, he continued to maintain contacts with the office until he left the State sometime in January, 1991.

4. Sometime in January, 1991, Mr. A. Paul Schwenke told me of his development project in the Nation Western Samoa. He also asked me to watch for any correspondence from the Bar Office concerning two matters that were very important. One of the matters was a Kirk Heaton complaint which Mr. Schwenke asked me to file a Notice of Appeal on his behalf as soon as the Commission's recommendation is submitted to the Supreme Court.

5. I started opening Mr. A. Paul Schwenke's mails soon thereafter.

6. I had not heard from Mr. A. Paul Schwenke for about two months, so when I received a correspondence from the Bar Office for Mr. A. Paul Schwenke about the middle of March, 1991, concerning the other Bar matter that Mr. Schwenke asked me to watch for, I felt that it was important that I give the Bar Office some written notification of Mr. A. Paul Schwenke's whereabouts. That was when I submitted an affidavit on March 27, 1991, advising the Bar Office that Mr. A. Paul Schwenke was out of the country. Please see a true and exact copy said affidavit, attached hereto and incorporated herein by this referenced.

7. The office complex that my office is located is a shared office arrangement between several businesses including lawyers

and non-lawyers. All the businesses share one common receptionist provided and paid for by the landlord. Mr. A. Paul Schwenke has shown me what appears to be the mailing certificate for the Commission's Findings, Conclusions and Recommendation and the return receipt for the certified mail. The return receipt shows that a Norma Davis signed for the mail. I do not know a Norman Davis, but I do believe she had to be one of the many different temporary receptionists that fill in when the regular receptionist is absent.

8. That have not seen, until recently, a copy of the Commission's Findings, of Fact, Conclusions, and Recommendation. If I had seen the Commission's Findings of Fact, Conclusions

of Law and Recommendation in this matter, I would have timely filed a Notice of Appeal.

Dated this 7th day of May, 1992.

_____

Jamis M. Johnson, Affiant

Jamis M. Johnson, appeared personally before me this 7th day of May, 1992, and stated to me that he has personal knowledge of the facts stated herein are true.

SUBSCRIBED AND SWORN TO BEFORE ME this ____ day of May, 1992.

_____

Notary Public residing in
Salt Lake County

My Commission Expires:
12-4-94

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered, a true and exact copy of the foregoing affidavit of Jamis M. Johnson to the following parties and at their respective addresses on this ___ day of May, 1992:

Board of Bar Commissioners
Utah State bar
645 South 200 East
Salt Lake City, Utah 84111

Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111

_____
Deborah Doherty

BOARD OF BAR COMMISSIONERS
UTAH STATE BAR

| | | |
|---|---|---|
| CAREN SERR | : | RESPONSE TO MOTION FOR |
| vs. | : | RECONSIDERATION |
| A. PAUL SCHWENKE | : | F-322 |

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COMES NOW the Office of Bar Counsel by and through Wendell K. Smith, Assistant Bar Counsel, and submits the following response in opposition to Respondent's Motion for Reconsideration.

1. Respondent's Motion is without merit, the matters raised in this motion regarding service of process were fully, fairly, and competently litigated before the Hearing Panel on March 2, 1992, and decided against Respondent. He has not alleged nor produced any evidence that the decision of the Hearing Panel was, arbitrary,

capricious, clearly erroneous or against the weight of the evidence. He merely seeks a de novo review before the Board of Bar Commissioners of the matters litigated before the Hearing Panel. Such a request is inappropriate and contrary to the Procedures of Discipline of the Utah State Bar and the purpose of having Hearing Panels consider cases and make recommendations to the Board.

2. Respondent's allegation that he was not properly served with the pleadings in the above-entitled action is without merit. The evidence presented to the Hearing Panel verified that all documents were sent to Respondent at his last known address as shown by the official roster of attoneys of the Bar and/or to addresses where the Bar had reasonable grounds to

believe Respondent was residing or would have received the documents. Contrary to his assertion Respondent did not keep the Bar informed of his whereabouts. The Bar exercised reasonable diligence to learn where Respondent could be reached and sent documents to those addresses where they should have been received by Respondent. The Hearing Panel found Respondent was properly served with all documents associated with the above-entitled action in accordance with Rule XI(b) of the Procedures of Discipline of the Utah State Bar. There is no evidence this finding was clearly erroneous, arbitrary, capricious, or against the weight of the evidence.

3. Respondent was afforded the opportunity by the Hearing Panel on March 2,

1992, to litigate the substance of the charges against him as set forth in the Formal Complaint even though Respondent had defaulted as to those charges. Evidence to substantiate th charges were presented by the Office of Bar Counsel. Respondent had the opportunity to examine the evidence, to confront and cross examine the witnesses against him and to present matters in his own defense.

4. Respondent's allegation that this action is racially motivated is without merit. Ron and Caren Ser retained Respondent, not Bruce J. Udall, as their counsel. The uncontrovertable facts established at the hearing on March 2, 1992, verify that Respondent, not Bruce J. Udall, stole approximately $63,000.00 from Ron and

Caren Serr. The Board can take notice of the fact that in the last three months there have been recommendations for disbarment of two white attorneys who stole considerably less than this amount from their clients. Respondent's assertion that the recommendation for his disbarment is racially motivated in light of his egregious misconduct connot possibly be made in good faith.

WHEREFORE, the Office of Bar Counsel moves that Respondent's Motion for Reconsideration be denied.

Dated this ___ day of May, 1992

Office of Bar Counsel

_____

Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Response to Mottion for Reconsideration in the matter of Ron and Caren Serr against A. Paul Schenke, F-322, was mailed postage pre-paid to A. Paul Schwenke at 106 Magic Drive, Murray, Ut. 84107 on this ___ day of May, 1992

_____

Paul Schwenke #3951
Attorney Pro Se
106 Magic drive
Murray, Utah 84107
801-265 8530

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR.

In the Matter of the Complaint
by RON AND CAREN SERR,

against

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83
Respondent.

REPLY TO BAR COUNSEL'S RESPONSE TO MOTION FOR RECONSIDERATION.

Case Number F-322

Respondent, A. Paul Schwenke, respectfully submits this reply to Bar Counsel's Response to Motion for Reconsideration. Mr. Wendell K. Smith, Assistant Bar Counsel, presented four arguments in opposition to the Respondent~s Motion for Consideration. Respondent will reply below to each of Bar Counsel's

arguments. First, Mr. Wendell K. Smith asserts that the issue of service of process was fully, fairly and competently litigated before the hearing panel during the sanctions hearing on March 2, 1992. Additionally, raising this issue before the Board of Bar Commissioners (hereafter "Commissioners") is inappropriate and contrary to the Procedures of Discipline of the Utah State Bar. Answering the second point first, the respondent invites the Commissioners attention to Rule VII(f) of the Procedures of Discipline of the Utah State Bar. This rule clearly allows for; this type of motion for the Commissioners to reconsider matters that had already been considered by the hearing panel. The hearing panel is not infallible, and as shown in

this case, the hearing panel can make mistakes.

The second point raised by Bar Counsel's first argument is that the issue of service of process had been fully, fairly and competently considered by the hearing panel. Respondent agrees that he raised the issue of defective service of process at the March 2, 1992 sanctions hearing. The issue, however, was far from being fully, fairly and competently considered by the hearing panel. In fact, the hearing panel concluded that service of process may very well violate due process t it nevertheless complied with Rule XI(b) of the Procedures of Discipline of the Utah State Bar. As shown in the respondent's memorandum of points and authorities in support of this

motion for reconsideration, the hear g panel was clearly wrong in reaching said conclusion. The service of process was not made according to the requirements of Rule XI(b) and the service of process failed to meet the standard for due process as set forth in Carlson v. Bos, 740 P.2d 1269(Utah 1987).

Bar Counsel's second argument clearly mis-stated Rule XI(b) and further demonstrated ignorance of the requirements of due process as set forth in Bos, supra. Bar Counsel asserts that "[t]he evidence presented to the hearing panel verified that all documents were sent to Respondent at his last known address as shown by the official roster of attorneys and/or to adresses where the Bar had reasonable grounds to believe

respondent was residing or would have received the documnets.[1] Contrary to his assertion Respondent did not keep the Bar informed of his whereabouts." (emphasis added).

The underlined statements above are what Bar Counsel has added to the rule because Rule XI(b) does not include such requirements. To include such requirements in Rule XI(b) would clearly run counter to the mandate of Carlson v. Bos by shifting the burden to the respondent.[2] Please see

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1. It is interesting that Mr. Wendell K. Smith is now arguing "reasonable grounds to beleive Respondent . . . would have received . . " (which is not provided for under Rule XI(b)) when at the hearing he stressed that service was made at the last known address as shown on the official roster of attorneys of the Bar.

2. To accept Bar Counsel's argument here would mean that every defendant in a

the discussion of the Bos case in the respondent's memorandum of points and authorities in support of this motion for reconsideration.

Thirdly, Bar Counsel asserts that the substance of the charges in the formal complaint was litigated at the sanctions hearing of March 2, 1992 and respondent therefore had his opportunity to be heard, examined the evidence, confronted and cross-examined the witnesses and to present matters in his own defense. The March 2, 1992 hearing was to determine the proper sanctions based on the facts of the formal

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civil action will have to make sure the plaintiff who ever he or she may be, has the defendant's address for proper service of process. I doubt very much that Rule XI(b) imposes such a burden on unsuspecting defendants.

complaint which were deemed admitted on account of the respondent's allege default. The purpose of the hearing was for Bar Counsel to present evidence of aggravation while respondent presents any evidence as to mitigation Contrary to Mr. Wendell K.. Smith's assertion, the respondent just did not have his day in court and the sanctions hearing was nc substitute.

Finally, Bar Counsel asserts that respondent's claim of disparate treatment cannot be made in good faith because the incontrovertible facts established at the hearing on March 2, 1992, verify that respondent, not Bruce J. Udall, stole approximately $63,000.0o from Ron and Caren Serr. Bar Counsel further states that respondent, not Bruce J. Udall, was retained

by Ron and Caren Serr. Bar Counsel's statement is defamatory and blatantly false. No evidence has ever been adduced, at the March 2, 1992 hearing or at any other time, that respondent stole $63,000.00 from Ron and Caren Serr. In fact, all of the evidence available, bearing on the issue of theft, were properly presented to a jury which unanimously found that the respondent did not commit any theft. Mr. Wendell K. Smith's statement is not only defamatory, it is clearly calculated to inflame the emotion of the Commissioners.[3]

Additionally, Mr. Wendell K. Smith misrepresented the fact of Mr. Bruce Udall's

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3. Mr. Wendell K. Smith's charge that the Respondent stole $63,000.00 is without any factual basis. Clearly, unsupported charges further support Respondent's claim of disparate treatment.

relationship to Ron and Caren Serr. Mr. Wendell K. Smith stated that iron and Caren Serr retained Respondent, not Bruce J. Udall, as their counsel". In Bar Counsel's formal complaint against Mr. Bruce J. Udall, Bar Counsel charged that Bruce J. Udall was a partner in the law firm of Schwenke and Udall.[4] That Mr. Bruce J. Udall negotiated the fee agreement to for the partnership to represent Caren Serr.[5] That Mr. Bruce J. Udall was directly involved in the financial affairs of the purported partnership, having direct knowledge of what monies were received, the monies origin, use and

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4. Formal Complaint, F-382, Part III, paragraph 2.

5. Formal Complaint, F-382, part III, paragraphs 4 and 5.

disbursement.[6]

Respondent challenges the Commissioners to conduct a close examination of the facts of the relationship of Mr. Bruce J. Udall and respondent and their relationship to Ron and Caren Serr. The respondent is confident that the Commissioners will find no difference between Mr. Bruce J. Udall's actions and the respondent actions vis a vis Ron and Caren Serr. But why is there a difference in the sanctions sought. Since the respondent is not white anglo saxon, it is not hard for the respondent to conclude that his color may be the difference.

Respondent prays that the Commissioners

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6. Formal Complaint, F-382, part III, paragraph 3. Mr. Bruce UdJ. Udall handled the partnership's check book.

will take corrective actions in this matter, vacate and set aside the Findings of Fact, Conclusions of Law and Recommendation, vacate and set aside the respondent's default and order Bar Counsel to effect proper and lawful service of the summons and complaint herein.

Dated this _ day of May, 1992.

_____

A. Paul Schwenke

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand-delivered a copy of the foregoing request for reconsideration to Mr. Wendell K. Smith, Assistant Bar Counsel, 645 South 200 East, Salt Lake City, Utah this __ day of May, 1992.

_____

IN THE UTAH STATE BAR
OF THE UTAH STATE BAR
Hearing Panel:
Robert Wallace
E. Gregg Tobler
Sandra Wilkins

In The Matter of the Complaint
by

RON AND CAREN SERR

FINDINGS AND ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION

against

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

This matter came on for Hearing on May 28, 1992 before the Board of Bar Commissioners of the Utah State Bar ("the Board") on Respondent's Motion for Reconsideration of the Board's approval of the Findings of Fact, Conclusions of Law and Recommendation of Discipline submitted by the Hearing Panel. The Office of Bar Counsel

was represented by Wendell K. Smith, Assistant Bar Counsel and the Respondent appeared Pro SE.

Respondent informed the Board that the last address at which he practiced law in Utah was 165 South West Temple, Suite 300, Salt Lake City, Utah 84111, and that when the Summons and Formal Complaint were sent to that address on December 4, 1990, he was still residing in Utah. However, Respondent denies that he received these documents or notice of these documents.

Bar Counsel who was also present at the Hearing informed the Board that persons from his office had investigated and determined that Respondent was no longer at the address shown on the official roster of attorneys of the Bar and, therefore, sent the Summons,

Formal Complaint, Notice of Intent to Default, and Default to his last known actual address. Bar Counsel also informed the Board that an attorney whose office was at that location had agreed to forward all documents to Respondent mailed to that address.

Respondent informed the Board that correspondence, pleadings and any other documents in connection with this matter could be sent to him at either of the following addresses:

106 Magic Drive
Murray, Utah 84107
121 East 5460 South, Apt. 35
Murray, Utah 84107

Respondent further represented to the Board that he did not learn of the Sanctions Hearing scheduled for March 2, 1992, until

he arrived in Salt Lake City on another matter. Assistant Bar Counsel advised the Board the Respondent told the Hearing Panel that he learned of the Hearing from someone residing at the address in Las Vegas, Nevada to which the Notice of Hearing was mailed. Nevertheless, he stated that he did not have sufficient notice to adequately prepare for the Hearing.

Respondent advised the Board that he had received a copy of the Formal Complaint issued in the above-entitled action.

The Board having heard the arguments of Counsel, and being otherwise fully advised in the premises, hereby makes its Findings as follows:

FINDINGS

1. On or about December 4, 1990, the

Summons and Formal Complaint issued in the above-entitled action were served on Respondent by sending them by certified mail to the last known address where Respondent was practicing law which was 165 South West Temple, Suite 300, Salt Lake City, Utah 84111. The Summons and Formal Complaint were not returned to the sender.

2. Respondent did not file his Answer to the Formal Complaint and on January 11,. 1991 Notice of Intent to Default was sent to Respondent by certified mail to the above-noted address. The Notice of Intent to Default was not returned to the sender.

3. Default was entered against Respondent in the above entitled action on March 19, 1991, and served upon Respondent by sending a copy by certified mail to the

above-noted address. The Default was not returned to the sender.

4. On December 6, 1991, Notice of Hearing was sent to Respondent by certified mail to P.O. Box 57853, Murray, Utah 84107 and 5233 Holbrook Drive, Las Vegas, Nevada 89103. Neither Notice of Hearing was returned to sender. The Notice of Hearing informed Respondent that a Sanctions Hearing would be held on March 2, 1992, at 9:00 a.m. at the office of the Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

5. Respondent appeared at the Sanctions Hearing and indicated that he had learned of the Hearing due to the Notice sent to the address in Las Vegas. Caren Serr and Samuel King were called as witnesses and presented testimony on the merits of the complaint

against Respondent. Respondent also presented matters in his own defense and in extenuation and mitigation.

6. The Hearing Panel found Respondent had been properly served with the pleadings in this action and upon consideration of the case recommended that Respondent be disbarred.

7. On May 20, 1992, Respondent filed a Motion for Reconsideration with the Board of Bar Commissioners the substance of which alleged that he had received no actual notice of the Formal Complaint filed in this action and that default could not be entered against him since the Formal Complaint, Notice of Intent to Default, and Default had been sent to his last known address as an attorney in Salt Lake City, Utah rather

than his last known address as shown by the official roster of attorneys of the Bar.

## CONCLUSIONS

Based upon the foregoing findings, the Board concluded that, in the interest of fairness, Respondent should be allowed to present the merits of his position to the Hearing Panel and that his Motion for Reconsideration should be granted.

## ORDER

Based upon the foregoing findings and conclusions, it is hereby ORDERED that Respondent's Motion for Reconsideration be and the same hereby is granted; and it is further ORDERED that Respondent file his Answer to the Formal Complaint in the above-entitled action and serve a copy thereof on the Office of Bar Counsel within

ten (10) days the date of this Order.

DATED this 8th day of June, 1992.

BAR COMMISSIONERS

_____

James Z. Davis
President

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order was mailed certified mail, return receipt requested, postal certificate number P805 583 724 to A. Paul Schwenke at 106 Magic Drive, Murray, Utah 84107, 121 East 5460 South, Apt. 35, Murray Utah 84107, and P.O. Box 7853, Murray, Utah 84107, this 16th day of June, 1992.

_____

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

| | |
|---|---|
| In the matter of the Complaint by, | OBJECTION TO THE FINDINGS AND ORDER |
| GRANTING CAREN SERR | RESPONDENT'S MOTION FOR RECONSIDERATION. |
| against | |
| A. PAUL SCHWENKE<br>DOB: 10-12-51<br>ADM: 05-09-83 | F-322 |

Respondent respectfully objects to the Findings and Order Granting Respondent's Motion for Reconsideration on the following grounds:

1. The Findings and Order as prepared by Bar Counsel does not accurately reflect the facts before the Board, the legal basis for the Motion and the remedies sought by Respondent.

2. The respondent's Motion for Reconsideration was based on two grounds.

(1) The service of the Summons and Complaint was defective under the constitutional standard articulated in Mullane v. Central Hanover Bank, 339 U.S. 306, 314; 70 S. Ct. 652, 657; 94 L.Ed.865 (1950), Carlson v. Bos, 740 P.2d 1269, 1275 (Utah 1987) and the proceedings pursuant to a defective service of process was violative of respondent's rights to due process under the Constitution of the State of Utah and the Constitution of the United States of America. (2) The sanctions imposed was racially discriminatory.

3. The respondent sought to have the Recommendation of Discipline dismissed, the default vacated, and Bar Counsel to effectuate constitutionally proper service of the Summons and Complaint.

4. The granting of the respondent's Motion could not have been founded of the second ground of racial discrimination because it was addressed only to the appropriateness and fairness of the recommended sanctions.

5. The granting of the respondent's Motion must have been based solely on the fact that the service of process was defective. If the service of process was defective in December 4, 1990, it could not all of a sudden be clothed with validity in June 1992 without Bar Counsel curing the reason for the defect.

6. The only logical Order when the respondent's Motion was granted because the service of process was defective is an Order granting the remedy sought in the Motion as

set forth above in paragraph #3.

For the foregoing reasons the respondent respectfully requests that the honorable Board of Bar Commissioners rescind the Findings and Order Granting Respondent's Motion for Reconsideration and to enter an Order that is consistent with the facts, the legal arguments and the remedies as expressly set forth in the respondent's moving papers.

Dated this 29 day of June, 1992.

_____

A. Paul Schwenke
Respondent.

CERTIFICATE OF HAND-DELIVERY.

I hereby certify that I hand-delivered, a true and exact copy of the foregoing Objection to the following this 29 day of June 1992:

Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111

_____
A. Paul Schwenke

A. Paul Schwenke #3951
Respondent
106 W. Magic Dr.
Murray, Utah 84107
Telephone: 8011 269-9029

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR.

In the matter of the
Complaint by,

MOTION TO QUASH

CAREN SERR,

against

F-322
A. PAUL SCHWENKE
DOB: 10-12-51

Respondent appears specially and respectfully moves the Board of Bar Commissioners by and through the Hearing Panel to quash the Summons and Complaint allegedly served on respondent. This Motion is based on the following grounds.

1. The Board of Bar Commissioner's granted petitioner's Motion for Reconsideration of the Hearing Panel's Recommendation of Discipline against the Respondent on the ground that the service of the Summons and Complaint was defective under the standard promulgated in Mullane v. Central Hanover Bank, 339 U.S. 306, 314; 70 S.Ct. 652, 657; 94 L.Ed. 865 (1950) and Carlson v. Bos, 740 P.2d 1269, 1275 (Utah 1987).

2. The Summons and Complaint have not been served pursuant to Rule VIII of the Rules of discipline of the Utah State Bar nor was the Summons and Complaint served pursuant to Rule 4 of the Utah Rules of Civil Procedures and accordingly this proceeding violates the respondent~s due process rights under the Constitution of the State of Utah and the Constitution of the United States of America.

3. The respondent has substantive rights conferred by the rules of discipline, limitation of action provision, and under the generally applicable limitation of action statutes. Without a time certain wherein the respondent has been served, respondent is arguably denied his rights to assert the applicable statute of limitation

as a defense.

For the foregoing reasons and any other arguments in supplemental thereto, the respondent respectfully requests the Hearing Panel to quash the service of the Summons and Complaint and dismiss this matter.

Dated this 29 day of June, 1992.

_____

A. Paul Schwenke
Respondent.

CERTIFICATE OF HAND-DELIVERY.

I hereby certify that I hand-delivered, a true and exact copy of the foregoing Objection to the following:
Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111
this 29 day of June, 1992.

_____

A. Paul Schwenke

Wendell K. Smith, #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 S. 200 E.
Salt Lake City, Utah 84111
801-531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of
the Complaint by

CAREN SERR

SUMMONS

against

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

THE UTAH STATE BAR TO:
A. Paul Schwenke
106 Magic Drive
Murray, Utah

You are hereby cited to appear and file an Answer in writing within twenty days after service of this Summons upon you, asserting your defense to the Complaint in the above entitled action, a copy of which

is attached and served herewith. If the service of the Summons and attached Complaint is by mail, you actually have twenty-three (23) days from the date of the mailing of the Summons and Complaint to have your Answer postmarked or personally filed with John C. Baldwin at the Bar Office.

If you fail to answer within the time fixed by this Summons, the Commission will enter your default, deem the allegations admitted, and proceed to fix the time and date for a hearing to receive evidence and argument with respect to the discipline, if any, to be imposed or recommended.

DATED this _____day of July, 1992.

| | |
|---|---|
| Wendell K. Smith<br>Assistant Bar Counsel | Dale Kimball,<br>Chair Ethics and discipline<br>Committee |

Sllvan D. Warnick
Salt Lake CountyConstable

STATE of UTAH
ss AFFIDAVIT OF SERVICE
COUNTY OF SALT LAKE

I, Douglas Magbey being first duly sworn upon oath, depose and say: That I am a resident of the State of Utah and a citizen of the United States over the age of 18 years at the time of service herein, and not a party to or interested in the within action. That on the 7 day of July, 1992, I received a copy of the annexed:

SUMMONS & COMPLAINT

and delivered a true and copy of the same to Defendant personally, on the 7 day of July, 1992, 10:05 p.m. at 106 Magic Drive.
I further certify that at the time of such service of the above said article(s) I

endorsed the date and added my name therto.

Subscribed and sworn to before me this

7 day of July, 1992.

Douglas Magbey

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ALANNA WARNICK
NOTARY REPUBLIC
STATE OF UTAH
My Commission expires
November 19, 1994

| | |
|---|---|
| Mileage Fee | $9.00 |
| Service Fee | $6.00 |
| Tendered Fee | |
| Total | $15.00 |

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the Complaint by
CAREN SERR DEFAULT
gainst F-322
A. PAUL SCHWENKE
DOB: 12-12-51
ADM: 05-09-83

The Respondent having been regularly served with process, and having failed to appear and answer the Formal Complaint on file in the above-captioned matter, and the time allowed by the Procedures of Discipline of the Utah State Bar and the Summons for answering having expired, the default of the Respondent is hereby entered, upon the request of the Office of Bar Counsel.

DATED this 19 day of March, 1991.

_____

JOHN C. BALDWIN
Executive Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Default was mailed certified mail, postal certification number P753 115 861 to A. Paul Schwenke at 165 S. West Temple, Suite 300, SLC, UT 84101 on this 19th day of March, 1991.

_____

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of theComplaint by,
ANSWER

CAREN SERR,
against F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83 JURY DEMAND

Respondent answers and alleges as follows:

FIRST DEFENSE

The Summons and Complaint and the claims alleged therein are barred by the applicable statute of limitations.

SECOND DEFENSE

The Summons and Complaint and the charges alleged therein are barred by the doctrine of laches.

THIRD DEFENSE

The Summons and Complaint and the

allegations and issues raised therein are barred by the doctrine of collateral estoppel.

FOURTH DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FIFTH DEFENSE

Respondent answers each of the allegations of the Complaint as follows:

1. Respondent admits allegations of Part I of the complaint.

2. Respondent is without sufficient information to admit or deny allegations of paragraphs 1 through 3 of Part II of the Complaint and for this reason denies the same.

3. Respondent denies allegations of

Part III of the Complaint.

4. Respondent admits allegations of paragraph 5, Part IV.

5. Respondent denies allegations of paragraphs 6 through 30, Part IV of the Complaint.

Wherefore, Respondent prays for dismissal of this matter, no cause of action, and for an award of his costs in defending this action.

Dated this 5 day of August, 1992.

_____

A. Paul Schwenke
Respondent.

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a true and exact copy of the foregoing answer to Wendell K. Smith, Assistant Bar Counsel 645 South 200 East, Salt Lake City, Utah 84111, this 5 day of August, 1992,

_____

A. Paul Schwenke

BEFORE THE BOARD OF BAR COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of the Complaint
by CAREN SERR,
**RESPONDENT'S**

against
**OBJECTIONS TO THE FINDINGS AND ORDER**
A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

**ORDER DENYING MOTION TO QUASH AND OVERRULING HIS OF THE BOARD OF BAR COMMISSIONERS**

Case No. F-322

The Board of Bar Commissioners having considered Respondent's Motion to Quash the Summons issued in the above-entitled action, his objections to the Findings and Order of the Board granting his Motion for Reconsideration, and the Office of Bar Counsel's Response in Opposition thereto with attached exhibit, and being fully advised in the premises, it is hereby

ORDERED that Respondent's Motion to

Quash be, and the same is hereby denied, having been rendered moot by his personal service on July 7, 1992. It is further

ORDERED, that Respondent's Objection to the Board's Findings and Order Granting his Motion for Reconsideration be, and it is hereby, denied and overruled. Respondent may raise those issues contained in his objection before the Hearing Panel when it reconvenes to rehear his case.

DATED this 10th day of August, 1992.

BOARD OF BAR COMMISSIONERS

By: _____
Randy L. Dryer, President

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Order Denying Respondent's Motion to Quash and Overruling His Objections to the Findings and Order of the Board of Bar Commissioners to A. Paul Schwenke, at 106 Magic Dr., Murray, Utah 84107, on this 12th day of August, 1992.

_____

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

| | |
|---|---|
| In The Matter of the Complaint by | MOTION TO AFFIRM FINDINGS |
| CONCLUSIONS AND CAREN SERR | RECOMMENDATIONS OF HEARING PANEL |
| against | |
| A. PAUL SCHWENKE<br>DOB: 10-12-51<br>ADM: 05-09-83 | F-322 |

COMES NOW the Office of Bar Counsel by and through Wendell K. Smith, Assistant Bar Counsel, and pursuant to the provisions of Rule XII(e) of the Procedures of Discipline of the Utah State Bar, moves the Board of Bar Commissioners for an Order affirming the Findings of fact, Conclusions of Law, and Recommendation of Discipline of the Hearing Panel entered in the above-entitled action on April 20, 1992. The grounds for this

Motion are more fully set forth in the Memorandum of Points and Authorities attached hereto and incorporated herein.

DATED this 10 day of August, 1992.

OFFICE OF BAR COUNSEL

_____

Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and Correct copy of the foregoing Motion to Affirm Findings, Conclusions and Recommendations of Hearing Panel by certified mail, postal certification number P 805 583 708, to A. Paul Schwenke, at 106 Magic Dr., Murray, UT 84107, on this 10 DAY OF August, 1992.

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Wendell K. Smith, #3019
Assistant Bar Counsel
Office of Bar Counsel
645 South 200 East
Salt Lake City, UT 84111-3834
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the
Complaint by ) MEMORANDUM OF POI
) AUTHORITIES IN SU

| | |
|---|---|
| | ) OF |
| CAREN SERR | ) MOTION TO AFFIRM |
| | ) FINDINGS, |
| | ) CONCLUSIONS, AND |
| against | ) RECONMENDATIONS ( |
| HEARING PANEL | |
| A. PAUL SCHWENRE | |
| DOB: 10-12-51 | ) F-322 |
| ADM: 05-09-83 | |

COMES NOW, the Office of Bar Counsel by and through Wendell R. Smith, Assistant Bar Counsel, and submits the following Memorandum of Points and Authorities in support of Motion to Affirm the Findings of Fact, Conclusions of Law, and Recommendations of Discipline entered by the Hearing Panel in the above-entitled action on April 20, 1992.

STATEMENT OF THE CASE

1. On or about December 4, 1990, the Office of Bar Counsel served Respondent with a Summons and Formal Complaint in this

action by ~ending a copy thereof by certified mail to 165 South West Temple, Suite 300, Salt Lake City, Utah 84101, which was the last known address where Respondent was practicing law. The Summons and Complaint were sent to this address after an investigation was conducted by the Office of Bar Counsel which led to the determination that Respondent would not, in fact, receive any mail that was set to him at his last address as shown on the roster of attorneys of the Bar. A copy of this Summons and Formal Complaint is attached hereto as Exhibit 1, and incorporated herein.

2. Prior to serving Respondent by mail Bar Counsel, Stephen A. Trost, spoke with Jamis M. Johnson, Respondent's

associate, who stated that he would forward to Respondent all correspondence addressed to Respondent which was received at his office at 165 South West Temple, Salt Lake City, Utah. In reliance upon that representation of Mr. Johnson, and the investigation done by the Office of Bar Counsel, the Summons and Formal Complaint were sent by certified mail to Respondent at Mr. Johnson's office. The documents were received at that address and were not returned by the post office. The Affidavit of Stephen A. Trost is attached hereto as Exhibit 2, and incorporated herein.

3. On March 28, 1991, Default was entered against Respondent for his failure to file an Answer or other responsive pleading to the Summons and Formal

Complaint. A copy of this Default is attached hereto as Exhibit 3, and incorporated herein.

4. On or about December 6, 1991 a Notice of Hearing were sent to Respondent by Certified Mail to P.O. Box 57853, Murray, UT 84107 and 5233 Holbrook Drive, Las Vegas, NV 89103. The prior address was provided to the Bar by Respondent the latter addresses was provided by Mr. Jamis Johnson as being the current addresses where Respondent could be located. These Notices informed Respondent of a Sanctions Hearing to be held on March 2, 1992, at 9:00 a.m. at the Law and Justice Center, 645 South 200 East,Salt Lake City, UT. A copy of this Notice is attached hereto as Exhibit 4, and incorporated herein.

5. Respondent appeared at the Sanctions Hearing. Notwithstanding that the case was in default, the Office of Bar Counsel put on evidence regarding Respondent's violations of the Rules of Professional Conduct. Complainant Caren Serr and Samuel Ring were called as witnesses and testified about the substance of the matters set forth in the Formal Complaint. Respondent crossexamined the witnesses, examined the documents offered by the witnesses, and put on matters in his own defense. The Hearing Panel, having considered the evidence, including Respondent's defense to the charges, recommended that Respondent be disbarred. A copy of the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Hearing Panel is attached hereto as

Exhibit 5, and incorporated herein.

6. On May 4, 1992, the Board of Bar Commissioners signed an Order affirming the Findings, Conclusions and Recommendations of the Hearing Panel. A copy of this Order is attached hereto as Exhibit 6, and incorporated herein.

7. On May 19, 1992, Respondent filed a Motion for Reconsideration with the Board of Bar Commissioners asking them to reconsider their Order of May 4, 1992. The substance of his Motion was that he had not been served with the Summons and Formal Complaint in the above-entitled action. A copy of his Motion is attached hereto as Exhibit 7. The Office of Bar Counsel's Response to Motion for Reconsideration is attached hereto as Exhibit 8, and incorporated herein.

8. On May 28, 1992, the Board of Bar Commissioners granted Respondent's Motion for Reconsideration. On that date Respondent appeared before the Board, provided them with his current address, alleged that he had not been served with the Summons and Formal Complaint in this action, and admitted to the Board he was then in possession of a copy of the Summons and Formal Complaint filed in F-322. Based upon Respondent's admission before the Board that he had received a copy of the Formal Complaint the Board ordered him to file his Answer thereto within 10 days. The Board's Order which was signed on June 8, 1992, is attached hereto as Exhibit 9, and incorporated herein.

8. On or about June 29, 1992, in lieu

of an Answer, Respondent filed an Objection to the Findings and Order of the Board of Bar Commissioners and a Motion to Quash the Summons. He again alleged that the Summons was invalid because he had not been properly served. A copy of Respondent's Motion to Quash is attached hereto as Exhibit Q.

9. On July 7, 1992, Respondent was personally served with a Summons and Formal Complaint in the above entitled action. A copy of the Affidavit of Service by Constable Silvan D. War nick, is attached hereto as Exhibit 11, and incorporated herein. The Affidavit of Constable Warnick verifies that Respondent was personally served in the aboveentitled action on July 7, 1992, at 10:05 p.m. at 106 Magic Drive, Murray, Utah. Respondent did not file an

Answer in response to this personal service of a Summons and Formal Complaint within the time set forth in the Summons.

10. On July 31, 1991, Default was entered against Respondent. A copy of the Default is attached hereto as Exhibit 12, and incorporated herein. Respondent has again defaulted in this action by failing to file an Answer even though personally served with the Summons and Complaint.

11. The Hearing Panel appointed in this case has already heard and considered the evidence and the matters submitted by Respondent in his own defense, as well as in extenuation and mitigation.

CONCLUSION

12. Respondent has forfeited his right to present further matters to the Hearing

Panel. Therefore, the Office of Bar Counsel moves the Board of Bar Commissioners for an Order Affirming the Findings of Fact, Conclusions of Law, and Recommendation of Discipline entered by the Hearing Panel following the Sanctions Hearing held in this matter on March 2, 1992.

DATED this 10th day of August, 1992.

OFFICE OF BAR COUNSEL

By: Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Motion to Affirm Findings, Conclusions and Recommendations of Hearing Panel by certified mail, postal certification number , to A. Paul Schwenke, at 106 Magic Dr.,

Murray, UT 84107, on this 10th day of August, 1992.

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THIS MEMORANDUM HAD 12 EXHIBITS, ONLY EXHIBIT #2 IS INCLUDED HEREIN BELOW. THE OTHR 11 EXHIBITS ARE IRRELEVANT AND WERE INCLUDED BY BAR COUNSEL TO HIDE THE ILLEGAL EXHIBIT #2.

Stephen A. Trost, #3286
Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of the
Complaint by

CAREN SERR

AFFIDAVIT OF
STEPHEN A. TROST

against

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

STATE OF UTAH
ss .
COUNTY OF SALT LAKE

The affiant, Stephen A. Trost, being first duly sworn deposes and states:

1. I was appointed Bar Counsel for the Utah State Bar on February 1, 1990.

2. In the course of my duties as Bar

Counsel certain disciplinary cases were being prosecuted by the Office of Bar Counsel under my direction.

3. Due to the severity of the charges against Mr. Schwenke and his lack of response, I personally visited in or about December of 1990 the law office of Jamis Johnson located at 165 South West Temple, Suite 300, Salt Lake City, Utah where Mr. Schwenke office shared. See Exhibit A 1991 Capitol Reporters Legal Directory; Exhibit B a letter from Judge M. Murphy with enclosure; Exhibit C withdrawal of Counsel - all indicating 165 S. West Temple as the correct office address.

4. I spoke with Mr. Johnson regarding the pending disciplinary case and he informed me that if I used the 165 S. West

Temple address to mail pleadings and other correspondence he would see to it that Mr. Schwenke would receive the same.

5. Mr. Johnson confirmed that Mr. Schwenke was no longer residing in the State of Utah but that he did have a telephone number for Mr. Schwenke in Las Vegas where his exwife resided and that he had been successful in contacting Mr. Schwenke at that address and telephone number although he did not disclose these to me.

FURTHER AFFIANT SAYETH NOT.

DATED this 16th day of October, 1992.

Stephen A. Trost
Bar Counsel

Subsrcibed and sworn before me this 16th day of October, 1992.

NOTARY PUBLIC, Residing in Salt Lake County

BEFORE THE BOARD OF BAR COMMISSIONERS
THE UTAH STATE BAR

In the matter of the
Complaint by,

CAREN SERR,

against

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

MOTION TO SET ASIDE DEFAULT CERTIFICATE

F-322

JURY DEMAND

Respondent, A. Paul Schwenke, respectfully moves the Board of Bar Commissioners to set aside the default certificate entered in this matter on the ground that respondent inadvertently placed the answer back in his files rather than in the envelope delivered to the Bar Office.

Respondent was served with the summons and complaint in the above matter on July 7, 1992. On July 15, 1992, Respondent had an

answer ready to be filed with the Bar Office. Respondent took his answer and a memorandum of law and other documents on another unrelated matter to make copies for Bar Counsel. After making the copies, Respondent thought he placed all of the copies and the original of the answer for the Bar Office in a large envelope for delivery to the Bar Office. The envelope was delivered to the Bar Office on or about July 17, 1992. Unbeknownst to Respondent, he inadvertently placed the original of his answer and the copy intended to be filed with the Bar Office back in the file instead of the envelope for the Bar Office. Respondent did not discover his mistake until August 4, 1992 when he received a Request for Default in the mail. Upon

discovering the mistake, Respondent immediately filed the original and copy of the answer. Bar Counsel can attest that Respondent has been very diligent in responding to Bar matters in the last several months. That but for the mistake and inadvertence, the answer to the above captioned matter would have been timely filed.

Dated this 11 day of August, 1992.

_____

A. Paul Schwenke
Respondent.

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a true and exact copy of the foregoing Motion to Set Aside to Wendell K. Smith, Assistant Bar Counsel 645 South 200 East, Salt Lake City, Utah 84111, this 11 day of August, 1992.

_____

A. Paul Schwenke

ORIGINAL

A. Paul Schwenke #3951
Attorney Pro Se
75 East 400 South #300
Salt Lake City, Utah 84101
Telephone: 801 530-0100

FI L E D

October, 2 1992

IN THE UTAH SUPREME COURT UTAH

In the Matter of the Complaint

by CAREN SERR,

NOTICE OF APPEAL

against

A. PAUL SCHWENKE,
DOB:10-12-51
ADM: 05-09-83
Petitioner,

Case No. 92048

Case Number below
F-322

vs.

Utah State Bar,

Respondent.

A. Paul Schwenke, Petitioner, appearing Pro Se, pursuant to Rule XIV, Procedures of Discipline of the Utah State Bar, respectfully appeals to the Supreme Court the Order Affirming Findings of Fact

Conclusions of Law and Recommendation of Discipline entered by the Board of Bar Commissioners on September 3rd, 1992.

**BASIS FOR THE APPEAL**

Petitioner timely prepared his Answer to the Formal Complaint in this matter, but he inadvertently, placed the original and a copy of the Answer back in his file rather than in the envelope that Petitioner delivered to the Office of Bar Counsel on July 17, 1992. After discovering his mistake, Petitioner immediately filed his answer on August 5, 1992, although the filing was 9 days late.

Assistant Bar counsel, Mr. Wendell Smith, refused to stipulate to set aside the default certificate. Petitioner, immediately filed his motion to set aside

the default. Assistant Bar Counsel filed his motion to affirm the Findings, Conclusions and Recommendations. The Board of Bar Commissioners by its president, Randy L. Dryer, signed the order Affirming Findings, Conclusions, and Recommendation on September 3, 1992, in effect, granting Assistant Bar Counsel's motion but ignoring petitioner's motion.

Once again the Office of Bar Counsel has managed to impose discipline against petitioner without proving one iota of its frivolous charges. The court please be reminded that petitioner is under a one year suspension as result of a default. The default in the instant case is even more outrageous because if it is allowed to stand, Assistant Bar Counsel would have

successfully circumvented the statute of limitation. The four year statute of limitation ran in September, 1990.

I pray the court will clearly see the injustice perpetrated against the petitioner and reverse the order of the Board of Bar Commissioners.

PROCEDURAL FACTS.

1. On March 28, 1991, default for failure to answer the formal complaint was entered against the petitioner while he was out of the country.

2. Pursuant to said default a disciplinary hearing was held on March 2, 1992 at the Law and Justice Center. Petitioner was present at the hearing.

3. On May 4, 1992, the Board of Bar Commissioners signed an

Order affirming the Findings, Conclusions and Recommendations of the Hearing Panel.

4. On May 19, 1992, petitioner filed a Motion for Reconsideration of the May 4, 1992 order. Petitioner sought the following remedy: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the summons and complaint upon the respondent". Petitioner's motion was granted.

5. On June 8, 1992, The Board of Bar Commissioner's signed an order prepared by Bar Counsel granting petitioner's motion for reconsideration. The order clearly failed to accurately reflect the sum and substance

of petitioner's motion which had been granted.

6. On June 29, 1992, petitioner filed his objection to the order that had been signed on the ground that the order failed to properly reflect the merits of the matter before the Board of Bar Commissioner. Since the order erroneously required the petitioner to file an answer, petition also filed a motion to quash the Summons.

7. On July 7, 1992, petitioner was personally served with the Summons and Formal Complaint in this matter.

8. On August 10, 1992, the Board of Bar Cqmmissioners denied petitioners objection to the order granting petitioner's motion to reconsider on the ground that petitioner's objection was moot by the

personal service of the Summons and Formal Complaint upon petitioner on July 7, 1992.

9. On July 9, 1992, petitioner appeared before the special master by order of the supreme court on two charges of contempt against petitioner. After the hearing, the special master requested a memorandum of law from petitioner and a reply memorandum from Bar Counsel.

10. Beginning on July 14, 1992 through July 17, 1992, petitioner prepared the memorandum of law for the special master, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint in this matter.

11. On July 17, 1992 petitioner took the final drafts of the Memorandum of Lair, the Notice of Suspension, the Notice of

Compliance with Rule XVIII and the Answer to the Formal Complaint for copying. After copying, petitioner thought pe placed a copy of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the original !and a copy of the Answer in a large envelope with he delivered to the Law and Justice Center the same day. Unfortunately, petitioner was mistaken because he inadvertently put the original and copy of the Answer back in his file.;

12. On August 5, 1992, after receiving a copy of Bar counsel's Request to enter Default, petitioner checked his file and discovered his mistake.

13. After a futile effort to convince Assistant Bar Counsel, Wendell Smith to

stipulate to set aside the default, petitioner filed his motion to set aside the default on August 11, 1992.

14. The Board of Bar Commissioners have not acted on petitioner's motion to set aside the default, but it has already entered its order affirming Findings, Conclusion and Recommendation.

**GROUNDS FOR REVERSAL**

1. The default is a bad faith action by Bar Counsel to circumvent the statute of limitation which clearly bars this action.

2. Technically, the time for petitioner to answer should not have accrued until after the date of the denial by the Board of Bar Commissioners of petitioner's objection to the order granting petitioner's motion for reconsideration.

3. Technically, the order affirming Findings, Conclusions and Recommendation is premature because the Board of Bar Commissioners still has pending before it petitioner's motion to set aside the default certificate.

Dated this 1st day of October, 1992.

A. Paul Schwenke

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage pre-paid, a copies of the foregoing Notice of Appeal to Mr. Wendell K. Smith, Assistant Bar Counsel, and to the Executive Director, both at 645 South 200 East, Salt Lake City, Utah 84111, and to Honorable Geoffrey J. Butler, Clerk of the Supreme Court, at 332 State Capitol, Salt Lake City, Utah 84114, this 1st day of October, 1992.

A. Paul Schwenke #3951
Attorney Pro Se
75 East 400 South #300
Salt Lake City, Utah 84101

IN THE UTAH SUPREME COURT
DOCKETING STATEMENT

In the Matter of the Complaint
by CAREN SERR,

DOCKETING STATEMENT

against

A. PAUL SCHWENKE, No. 920480
DOB: 10-12-51
ADM: 05-09-83 Case Number below

Petitioner, F-322

vs.

Utah State Bar,

Respondent.

A. Paul Schwenke, Petitioner, appearing Pro Se, respectfully submits his Docketing Statement pursuant to Rule 9, Utah Rules of Appellate Procedure.

I. STATEMENT OF REQUIRED DATES.

1. Date of Order sought to be reviewed: September 3, 1992, and served by mail on September 9, 1992 or September 12, 1992 after adding three days for service by mail.

2. Date of the Notice of Appeal: The Notice of Appeal was filed by mail on October 1, 1992 with the erroneous filing fee of $100.00. The balance of $60.00 was paid on October 20, 1992 after petitioner was informed of the new fee schedule. The fee receipt showed October 21, 1992.

II. STATEMENT OF THE SPECIFIC RULE OR STATUTE CONFERRING JURISDICTION.

Appellate jurisdiction is proper pursuant to the following authorities: Rule XIV(a), Procedure of Discipline of the Utah State Bar.

2. Constitution of Utah, Art. VIII, 4.

III. A CONCISE STATEMENT OF THE NATURE OF THE PROCEEDING

This petition is to review the propriety of the procedure leading to the Order Affirming Findings of Law and Recommendation of Discipline of the Board of Bar Commissioners and to further review the propriety of proceeding against petitioner on a claim which is barred by the four year statute of limitation.

IV. A CONCISE STATEMENT OF MATERIAL FACTS.

1. The four year statute of limitation ran in September, 1990 .

2. On March 28, 1991, a default for failure to answer the formal complaint was entered against the petitioner while he was out of the country.

3. A disciplinary hearing based on the default was held a year later on March 2, 1992, at the Law and Justice Center. Petitioner was present at the hearing.

4. On May 4, 1992, the Board of Bar Commissioners signed an Order Affirming the Findings, Conclusions and Recommendations of the Hearing Panel.

5. On May 19, 1992, petitioner filed a Motion for Reconsideration of the May 4, 1992 Order. Petitioner sought the

following remedy: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the Summons and Complaint upon the respondent". Petitioner's motion was granted.

6. On June 8, 1992, The Board of Bar Commissioner's signed an Order prepared by Bar Counsel granting petitioner's Motion for Reconsideration. The Order clearly failed to accurately reflect the sum and substance of petitioner's motion which had been granted.

7. On June 29, 1992, petitioner filed his Objection to the Order that had been signed on the ground that the Order

failed to properly reflect the merits of the matter before the Board of Bar Commissioner. Since the Order erroneously required the petitioner to file an answer, petition also filed a Motion to Quash the Summons.

8. On July 7, 1992, petitioner was personally served with the Summons and Formal Complaint in this matter. Petitioners answer was due on July 27, 1992.

9. On July 9, 1992, petitioner appeared before a Special Master by order of the Supreme Court on two charges of contempt of the supreme court by the petitioner. After the hearing, the Special Master requested a memorandum of law from petitioner and a reply memorandum from Bar Counsel.

10. Beginning on July 14, 1992 through

July 17, 1992, petitioner prepared the Memorandum of Law for the Special Master, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint in this matter.

11. On July 17, 1992 petitioner took the final drafts of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint for copying. After copying, petitioner thought he placed a copy of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the original and a copy of the Answer in a large envelope which he delivered to the Law and Justice Center the same day. Unfortunately, petitioner was mistaken because he inadvertently put

the original and copy of the Answer back in his file.

12. On August 5, 1992, after receiving a copy of Bar counsel's Request to enter Default, petitioner checked his file and discovered his mistake. Petitioner also immediately filed his answer, although, it was 9 days late.

13. On August 10, 1992, the Board of Bar Commissioners denied petitioners Objection to the Order Granting Petitioner's Motion to Reconsider on the ground that petitioner's Objection was moot by the personal service of the Summons and Formal Complaint upon petitioner on July 7, 1992.

14. After a futile effort to convince Assistant Bar Counsel, Wendell Smith to stipulate to set aside the Default

Certificate, petitioner filed his Motion to Set Aside the Default Certificate on August 11, 1992.

15. The Board of Bar Commissioners have not acted on petitioner's Motion to Set Aside the Default Certificate, but it has already entered its Order Affirming Findings, Conclusion and Recommendation which led to this appeal being filed by the petitioner.

V. STATEMENT OF ISSUES PRESENTED BY THE APPEAL.

1. Is the delay of 9 days in filing petitioner's Answer to the Formal Complaint which was caused wholly by petitioners mistake in inadvertently placing the original and copy of the answer in his file rather than in the envelope containing a

copy of the Memorandum of Law for the Special Master, a Notice of Suspension, and the Notice of Compliance with Rule XVIII which envelope the petitioner delivered to Bar Counsel and Bar Director at the Law and Justice Center on July 17, 1992, such an unreasonable and inexcusable delay to penalize petitioner by entering a Default Order against him?

Applicable standard of appellate review and supporting authority: The findings of the Board of Bar Commissioners should be adopted unless they appear to be arbitrary or not in accord with the preponderance of the evidence. In re Bridwell, 474 P.2d 116 (Utah 1970).

2. Is the time for petitioner to file an Answer to the Formal Complaint

tolled and did not start to run until and after the Board of Bar Commissioners deny, on August 10, 1992, petitioner's Objection to the Order prepared by Bar Counsel granting petitioner's Motion for Reconsideration?

Applicable standard of appellate review and supporting Authority: The findings of the Board of Bar Commissioners should be adopted unless they appear to be arbitrary or not in accord with the preponderance of the evidence. In re Bridwell, 474 P.2d 116 (Utah 1970).

3. Is the Board of Bar Commissioner's Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline premature in that the Board of Bar Commissioners still

has pending before it petitioner's Motion to Set Aside the Default Certificate?

Applicable standard of appellate review and supporting authority: The findings of the Board of Bar Commissioners should be adopted unless they appear to be arbitrary or not in accord with the preponderance of the evidence. In re Bridwell, 474 P.2d 116 (Utah 1970).

4. Is the proceedings against petitioner arising from the claim of Caren Serr barred by the four year statute of limitation?

Applicable standard of appellate review and supporting authority: The findings of the Board of Bar Commissioners should be adopted unless they appear to be arbitrary or not in accord with the

preponderance of the evidence. In re Bridwell, 474 P.2d 116 (Utah 1970).

## VI & VII. STATEMENT WHETHER THE APPEAL IS SUBJECT TO ASSIGNMENT.

This appeal is not subject to assignment to the Court of Appeals because the Supreme Court has exclusive jurisdiction over this matter. Rule XIV, Procedures of Discipline of the Utah State Bar.

## VIII. STATEMENT OF APPLICABLE STATUTES, RULES OR CASES.

1. Rule 60 (b), Utah Rules of Civil Procedures.

2. Ney v. Harrison, 5 Utah 2d 217, 299 P.2d 1114 (Utah 1956).

3. Westinghouse Elec. Soapily Co. v. Larsen, 544 P.2d 876 (Utah 1975).

4. Heath man v. Fabian, 14 Utah 2d 60, 377 P.2d 189 (Utah 1962).

5. Ma v. Thompson, 677 P.2d 1109 (Utah 1984).

6. Rule 29, Proposed Rules of Lawyer Discipline and Disability.

7. In re Bridwell, 474 P.2d 116 (Utah 1970).

IX. RELATED OR PRIOR APPEALS IN THE CASE.

None.

X. NECESSARY ATTACHMENTS:

1. Order sought to be reviewed.

2. Petitioner has no been served with the Findings of Fact, Conclusions of Law and Recommendation of Discipline that was supposed to have been affirmed by the Board of Bar Commissioners by the September 3, 1992 Order. Please note that the Order sought to be reviewed was not served upon petitioner, by mail, until after September 9, 1992.

3. Motions and Orders pursuant to Rules 50(a), and (b), 52(b), 54(b) and 59, Utah Rules of Civil Procedure. NONE.

4. Notice of appeal.

Petitioner respectfully submits this docketing statement this ___ day of October, 1992.

_____

A. Paul Schwenke,
Petitioner

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered copies of the foregoing Docketing Statement to Mr. Wendell K. Smith, Assistant Bar Counsel, and to the Executive Director, both at 645 South 200 East, Salt Lake City, Utah 84111, and to Honorable Geoffrey J. Butler, Clerk of the Supreme Court, at 332 State Capitol, Salt Lake City, Utah 84114, this 1st0 day of October, 1992.

_____

A. Paul Schwenke

IN THE UTAH SUPREME COURT

IN RE A. PAUL SCHWENKE

PETITION FOR REHEARING

CASE NO. 920480

As the basis for his Petition for Rehearing, Petitioner sets forth the following:

**1. The opinion of the Supreme Court is based entirely on matters outside the appropriate scope of review in this case.**

The Supreme Court's Opinion is based solely on the affirmance of the default judgment entered on or about March 19, 1991 (and entered again on March 28, 1991). (See Record ("R.") at 24-27, and the Opinion of the Supreme Court dated December 1, 1993, at pages 5 through 7.) However, the issue of the validity of such default judgment was never one of the issues properly presented

to the Supreme Court for review pursuant to the Petition for Review of A. Paul Schwenke ("Schwenke").

The only order or judgment set forth as the subject of Schwenke's Petition for Review was the "Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline," entered September 3, 1992 ("September 3, 1992 Order"). (See Notice of Appeal filed with the Clerk of the Supreme Court on October 2, 1992, and R. 142.) No cross-appeal or cross-petition was filed by the Utah State Bar in this case. Accordingly, the only order or judgment presented to this court for review in this appeal was such "Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline," entered September 3, 1992.

It has long been the law of the State of Utah that issues not involved in the specific judgment or order appealed from cannot be considered and determined on appeal. See, Forbes v. Butler, 275 P. 772, 774 (Utah 1928) ("No appeal is taken from that part of the trial court's judgment on the accounting, hence the finding and the trial court's apparent view upon that question have no place in the record, and the question is not before us for determination."). Therefore, absent a cross-appeal or cross-petition presenting other issues for reveiw, the court could address only these issues which were inherently a part of the September 3, 1992 Order, which was the subject of the appeal. See, Terry v. Zions Co-Op Mercantile Inst.,

617 P. 2d 700, 702 (Utah 1980) (If the appellee wishes to argue for alteration of the judgment to enlarge his rights, such as to revive a claim rejected by the court below, he must file a cross-appeal or cross-petition.).

The Appellate Record and the applicable law clearly show that the only issues inherently included in a review of the September 3, 1992 Order were the following issues:

> 1) Whereas the September 3, 1992 Order was based on the default entered July 31, 1992, the issue of whether there was a factual and legal basis for the entry of the July 31, 1992 default was before the Court on Schwenke's Petition for Reveiw.
>
> 2) Whereas the September 3, 1992 Order impliedly denied Schwenke's Motion to Set Aside Default (concerning the July 31, 1992 default) the issue of whether the denial of

such motion to set aside default was erroneous was before the Court on Schwenke's Petition for Reveiw.

3) Whereas the September 3, 1992 Order affirmed the findings, conclusions and recomendations of the Hearing Board derived from evidence presented at the March 2, 1992 sanctions hearing, the issue of whether there was a factual and legal basis for such affirmance was before the Court on Schwneke's Petition for Review.

4) Whereas the issue of subject matter jurisdiction can be raised at any time in a proceeding, the issue of whether the Board of Commissioners had jurisdiction over the subject matter of the September 3, 1992 Order was before the Court on Schwenke's Petition for Review.

The Appellate Record was not properly paginated in chronological order in compliance with Rule 11(b) of the Rules of Appellate Procedure, which appears to have resulted in some confusion concerning the chronology of the procedural events in the

proceeding below. Therefore, in order for the Court to clearly understand which issues were inherently included in Schwenke's petition for review of the September 3, 1992 Order, a review of the proceedings below is necessary. A time line of the events in the tribunal below is summarized as follows:

1. The Utah State Bar filed a formal complaint on December 4, 1990, and then purportedly served the summons and complaint upon Schwenke, by sending a copy of the summons and complaint by certified mail to 165 South West Temple, Suite 100, Salt Lake City, Utah 84111, on or about December 4, 1990. (R. 1-10).

2. Based on such purported service of the summons and complaint, and based on Schwenke's failure to answer such complaint, identical default judgments were entered both on March 19, 1991, and again on March 28, 1991, as to the liability portion of the bar complaint. (R. 2427).

3. After a series of settings and re-settings of the sanctions hearing,

on or about December 6, 1991, a Notice of Hearing for a sanctions hearing scheduled for March 2, 1992, was mailed to Schwenke. (R. 79-80). Schwenke received actual notice of such hearing. (Supplemental Record ("S.R.") at 43-45).

4. Schwenke attended the sanctions hearing on March 2, 1992. (S.R. 28).

5. Following the sanctions hearing, the Hearing Panel submitted its Findings of Fact Conclusions of Law and Recommendation of Discipline of Hearing Panel on April 20, 1992. (R. 182-194).

6. On May 4, 1992, the Board of Commissioners of the Utah State Bar entered its Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline (of the Hearing Panel). (S.R. 18).

7. On May 5, 1992, Schwenke filed his Motion for Reconsideration of the Order Affirming Findings of Fact Conclusions of Law and Recomendation od Discipline. (R. 110).

8.On May 28, 1992, a hearing was held on Schwenke's Motion for Reconsideration, and such motion was granted. (S.R. 19, 23).

9.Bar Counsel (rather than Schwenke) prepared the proposed "Findings and Order Granting Respondent's Motion for Reconsideration," which proposed findings and order was signed by the Board of Commissioners on June 8, 1992, but was not placed in the mail for service on Schwenke until June 16, 1992. (R. 19 through 24). Such Order required Schwneke to file and serve his answer to the formal complaint within 10 days of the date of the order. (R. 23).

10.On June 29, 1992, Schwneke filed a Motion to Quash service of the original summons and complaint. (R. 90-91). Also on June 29, 1992, Schwenke filed his Objection to the Findings and Order Granting Respondent's Motion for Reconsideration, objecting to the form and content of the order, on the grounds that it did not conform with the actual order and findings made by the Board of Commissioners at the May 28, 1992, Hearing. (R. 127-129).

11.On July 7, 1992 the Utah State Bar, without leave of the Board of Commissiners, issued a new summons and had Schwenke personally served with such newly issued summons and origianl complaint. (R. 92-94).

12.On July 31, 1992, a new default was entered based on the service of process completed on July 7, 1992. (R. 97-98).

13.On August 5, 1992, Schwneke filed his answer (which answer was prepared on July 15, 1992, but which was not filed until August 5, 1992, because of inadvertance). (R. 100-103).

14.On August 10, 1992, the Board of Commissioners denied Schwenke's Motion to Quash on the basis that it was "rendered moot by his personal service on July 7, 1992," and also denied Schwenke's Objection to the Findings and Order Granting Respondent's Motion for Reconsideration. (R. 137-138).

15.On August 10, 1992, Bar Counsel filed its Motion to Affirm Findings Conclusions and Recomendations of Hearing Panel. (R. 144-145).

16. Schwenke filed his Motion to Set Aside Default on August 11, 1992. (R. 102-103).

17. On September 3, 1992, in response to Bar Counsel's Motion to Affirm Findings Conclusions and Recommendations of Hearing Panel, and in response to Schwenke's Motion to Set Aside Default, the Board entered

its Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline. (R. 142). It is this Order which is the subject of Schwenke's Petition for Review. (See Notice of Appeal filed with this Court on October 2, 1992.)

The Order of the Board of Commissioners granting Schwenke's Motion for Reconsideration constitutes the pivotal reference point in this case, for purposes of ascertaining the issues which were included within the scope of this appeal. Even though the Order of the Board of Commissioners granting Schwenke's Motion for Reconsideration (S.R. 19-23) is not the epitome of clarity, it is still clear that at the time the Board granted Schwenke's Motion for Reconsideration, at the minimum, the Board effectively vacated both the default judgment entered on March 19, 1991

(and on March 28, 1991), and the findings of fact, conclusions of law and recommendation of discipline entered May 4, 1992.

In Schwenke's Motion for Reconsideration, Schwenke expressly requested the following relief: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the summons and complaint upon the respondent." (R. 120-121). Accordingly, by granting Schwenke's Motion for Reconsideration, the Board should be deemed to have impliedly granted the requested relief, as follows, unless expressly stated otherwise: (1) an implied vacating of the Findings of Fact,

Conclusions of Law and Recomendation of Default entered on May 4, 1992, (2) an implied vacating of the default judgments entered on March 19, 1991, and on March 28, 1991, and (3) an implied ruling that the summons and complaint had not been properly served, and needed to be re-served.

The last page of the Findings and Order Granting Respondent's Motion for Reconsideration reads as follows:

> " CONCLUSIONS
> Based upon the foregoing findings, the Board concluded that, in the interest of fairness, Respondent should be allowed to present the merits of his position to the Hearing Panel and that his Motion for Reconsideration should be granted.
>
> ORDER
> Based upon the foregoing findings and conclusions, it is hereby Ordered that Respondent's Motion for Reconsideration be

> and the same hereby granted; it is further Ordered that Respondent file his answer to the Formal Complaint in the above-entitled action and serve a copy thereof on the Office of Bar Counsel within ten (10) days of the date of this Order."

(R. 23). Such Order contained no language inconsistant with a granting of the first two items of requested relief, above-described. However, the Order did contain express language which indicated the third item of requested relief, above-described, was not granted, wherein the Order required Schwenke to answer the formal complaint within 10 days, rather than requiring the Utah State Bar to re-serve the complaint. Therefore, such Order should be construed to have granted Schwneke's Motion for Reconsideration, in part, because the

default judgments entered on March 19, 1991, and on March 28, 1991, and vacated the findings of fact, conclusions of law and recommendation of discipline entered on May 4, 1992; additionally, such Order should be construed to have denied Schwenke's Motion for Reconsideration, in part, because it failed to grant his request to declare the original service of process improper and invalid.

Such Order (dated June 8,1992) was not vacated or amended by the tribunal below. Furthermore, such Order was not properly placed before this court for review as part of the subject matter of this appeal by either party. An order vacating a judgment, such as this one, is not a final order from which an appeal may be taken as a matter of

right. Van Wagenen v. Walker, 597 P.2d 1327, 1328 (Utah 1979). Rather, in order to appeal an interlocutory order such as the June 8, 1992 Order, the procedures of Rule 5 of the Utah Rules of Appellate Procedure ("EUROPE") must be followed. See, URAP Rule 5. Because the procedures for perfecting an interlocutory appeal of the June 8, 1992 Order were not followed, such Order is now the law of the case, and this Court has no jurisdiction to review such Order.

Finally, neither of the parties properly appealed the Order of the Board entered on August 10, 1992 (R. 137-138), which denied Schwenke's Motion to Quash and Schwenke's Objection to the Findings and Order Granting Respondent's Motion for Reconsideration. Accordingly, any issues

inherently included in that Order were not placed before the Supreme Court for review pursuant to this appeal, either, and could not be addressed by the Court pursuant to Schwenke's Petition for Review.

Because September 3, 1992 Order could only be based on the July 31, 1992 default, contrary to the Supreme Court's conclusion on page 5, paragraph 3, sentence 2 of its opinion, the depositive issue in this appeal was not whether Schwenke was properly served with process on December 4, 1990; rather, such issue was an issue that was a complete non-issue in relation to this appeal, which was improperly considered by the Court. Because the entire focus and thrust of the Supreme Court opinion was completely misplaced, misconstrued and wasted on that

non-issue (an issue clearly outside the scope of the issues before the court on appeal), there is no question that a rehearing is mandated in this case. To rule otherwise would only perpetuate what appears to have been, up to this point, an almost intentional violation of Mr. Schwneke's due process rights.

2. **There was no factual or legal basis for the entry of the July 31, 1992 default judgment, and the failure to set aside such default was clearly reversible error.**

The Findings and Order Granting Respondent's Motion for Reconsideration was signed on June 8, 1992 but was not served on Schwenke until June 16, 1992, and even then, was served only by mailing. (S.R. 23). Accordingly, the effective date of such

order for purposes of determining when Schwenke's answer to the formal complaint was due should be deemed to be June 19, 1992. See, URCP Rule 6(e). Accordingly, Schwenke's answer to the formal complaint was due on June 29, 1992, 10 ,days from such effective date.

Rule XI(c) of the Procedures of Discipline of the Utah State Bar provides that an answer to the formal complaint "may such defenses and motions as are permitted under the Utah Rules of Civil Procedure. Under URCP Rule 12(b), as the initial response to a complaint, a defendant may serve a motion alleging the insufficiency of process or service of process, in lieu of filing an answer. URCP Rule 12(b). If such a motion is filed in lieu of an answer, the

time for serving the answer is altered, and the time for filing the answer is tolled until ten (10) days after the court enters an order denying such motion. URCP Rule 12(a).

In this case, Schwenke filed a timely motion to quash service, which was the equivalent of a motion asserting insufficiency of process or service of process under URCP 12(b)(4) or (5). Accordingly, pursuant to URCP Rule 12(a)(1), Schwenke had a legal right to file his answer within ten (10) days after the Order denying his Motion to Quash was entered. The Order denying his Motion to Quash was not entered until August 10, 1992. Therefore, Schwenke's answer, filed on August 5, 1992, was timely filed. Because Schwenke's answer

was timely filed, there was no basis whatsoever for the entry of the July 31, 1992 default judgment. Accordingly, the setting aside of such default was not discretionary on the part of the Board, but rather, was mandatory. Therefore, the refusal of the Board of Commissioners to set aside the July 31, 1992 default was clearly reversible error.

Bar counsel argues that, because it issued a new summons, nineteen (19) months after filing the formal complaint, while Schwenke's timely Motion to Quash was still pending, the provisions of URCP Rule 12(a) (which tolled the time for filing Schwneke's answer) could somehow be totally ignored, and that Schwneke was required to file his answer within 20 days of such new service of

process. However, this argument is without basis. Although Rule XI(b) of the Procedures of Discipline of the Utah State bar does not specify a time deadline for service of the summons and complaint, by analogy to URCP Rule 4(b), the Bar was required to obtain leave of the Board of Commissioners before serving a summons and complaint more than 120 days after filing of the complaint. See, URCP Rule 4(b). The first time that the Board made any ruling that could possibly be deemed to have validated such service of process was August 10, 1992, when the Board ruled that such service of porcess mooted Schwenke's Motion to Quash. (R. 137). Accordingly, the only rational application of URCP Rule 12(a) to the facts of this case would set a deadline

of August 20, 1992, for the filing of Schwenke's answer--10 days after the motion to quash was denied, and 10 days after the Bar's untimely service of process was validated and ratified. To rule otherwise would eviscerate the provisions of URCP Rule 12(a). Firthermore, any question about the validity of the default should be resolved in favor of setting it aside. Board of Education of Granite School Dist. v Cox, 384 P. 2d 806, 807 (Utah 1963); Locke v Peterson, 285 P. 2d 1111, 1113 (Utah 1955).

Finally, the July 31, 1992 default should have been set aside on the grounds of excusable neglect or inadvertance. Schwneke filed a timely URCP Rule 60(b) motion to set aside such default. (R. 102-103). Schwenke's allegations concerning excusable

neglect and inadvertence were credible and unrebutted. (R. 102-103). Finally, it was clear from Schwenke's answer as well as from the testimony taken at the March 2, 1992 sanctions hearing that Schwenke had valid defenses to the allegations of the complaint. (R. 100-101; S.R. 121-142, 229-231). Because Schwenke's answer would have been timely by any standard had it been filed on July 15, 1992, and because the filing of such answer was delayed until August 5, 1992, only through inadvertence or excusable neglect, there is no question that the default should have been set aside, under the applicable law. See, May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984); Board of Education of Granite School Dist. v. Cox, supra, 384 P.2d at 807. Accordingly,

under every plausible theory, it was reversible error to refuse to set aside the July 31 default judgment.

3. **The September 3, 1992 Order was entered without the Board holding a new sanctions hearing following the July 31, 1992 default, as required by Rule XI(d) of the Procedures of Discipline of the Utah State Bar.**

Rule XI(d) of the procedures of the Utah State Bar states the following:

> "Default. In the event the attorney fails to file and serve his answer to the Formal Committee Complaint within the time established, he shall be deemed to have admitted the allegations and charges in the said Complaint and the Board shall enter the attorney's default. The Board shall thereupon fix a time and place for hearing, notice of which shall be given to Bar Counsel and the attorney, and shall thereupon proceed to hear and receive evidence and argument with respect to the discipline, if any, to be imposed or recommended."

At the first sanctions hearing, Schwenke indicated a desire to put on additional evidence at a later date. (S.R. 30-31). After the July 31, 1992 default, pursuant to Rule XI(d) of the Procedures of Discipline of the Utah State Bar, Schwenke had a right to a new hearing on the issues of sacntions. Because Schwenke was denied that right. the September 3, 1992 Order should be vacated.

4. **The Board of Commissioners had no subject matter jurisdiction to discipline Schwenke by prohibiting him from engaging in any activity other than the "practice of law."**

In Recommendation No. 5 of the Recommendation of Discipline affirmed by the Board in its September 3, 1992 Order, the Board prohibited Schwenke from maintaining a presence in or occupying an office where the

practice of law is conducted, and directed him to take such actions necessary to cause the removal of any indicia as a legal assistant, paralegal, law clerk or similar title, and in all other aspects to refrain from acting in such capacities. (R. 193-194). Although the Board had subject matter jurisdiction to regulate Schwneke's practice of law, it certainly had no subject matter jurisdiction to regulate activities for which no law license is required in the State of Utah. Therefore, that portion of the September 3, 1992 Order which attempts to regulate Schwneke's subletting of office space, and attempts to regulate Schwenke's employment as a legtal assistant, law clerk or paralegal should be declared to be null and void and of no legal effect. In the

State of Utah anyone who has the ability to do so may participate in these activities without a license to parctice law.

5. **The restitution order in this case was not based on the victim's actual loss, and therefore, should be remanded for further determination.**

Even according to the allegations of the complaint (which were deemed to be admitted), the amount of restitution ordered was excessive, because it bears no relationship to the victim's actual out-of-pocket loss. The allegations of the complaint state that the actual amount of the total settlement by Schwenke on behalf of Caren Serr was $93,539.48. In addition, the allegations of the complaint also asserted that Schwenke was entitled to an attorneys fee of $26,191.05, and that Caren

Serr actually received at least $15,810.00 of the settlement monies, and additional payments from Schwenke of at least $2,500-00. (R. 186-187). This complaint was an exhibit introduced at the March 2, sanctions hearing. (R. 181-189).

Finally, included in the Appellate Record as an exhibit to the Bar's Motion to Consolidate are the conclusions of law of Judge Rokich, stating that Caren Serr had received $15,000.00 from Bruce Udall (Schwenke's law partner) as partial payment of the settlement monies (R. 49).

Therefore, the victim's loss, even according to the a allegations of the Bar could have been no more than $34,038,43, and could have been much less ($93,539.48 - $26,191.05 - $15,810.00 - $2,500.00 - $15,000.00).

Accordingly, this issue should be remanded to the Board for a new determination based on Caren Serr's actual loss.

6. **The Appelate Record does not comply with Rule 11(b) of the Utah rules of Appelate Procedure.**

The clerk of the tribunal of Board of Commissioners had a duty to paginate all original papers in chronological order, and to prepare a chronological index of those papers. URAP Rule 11(b). This was not done in this case, and has resulted in a confusion of the issues on appeal.

7. **The Court's determination that the March 2, 1992 hearing constituted a "full-scale hearing on the merits of the allegations against [Schwneke]" was clearly erroneous.**

On page 7 of the opinion, the Supreme Court stated the following: "Although

Schwenke was in fact in default, he was nevertheless afforded a full-scale hearing on the merits of the allegations against him." This determination, which appears to be part of the basis of the court's affirmance on appeal, is clearly erroneous. Rule XI(d) of the Procedures of Discipline of the Utah State Bar states that in the evnet of a default, the allegations of the complaint are to be deemed admited, and therfore, a hearing is to be held to "hear and receive evidence and argument with respect to the discipline, if any, to be imposed or recommended." Accordingly, even the applicable procedural rules did not give the Hearing Panel jurisdiction to conduct a full hearing on the merits of the allegations. Nothing in the Appellate

Record (including the notice of the sanctions hearing) indicated that the sanctions hearing was anything other than a sanctions hearing. Finally, when Schwenke did put on evidence of his innocence at the sanctions hearing, the only result was that the Hearing Panel determined that Schwneke refused "to acknowledge the wrongful nature of his conduct." (R. 192, paragraph 5). Because such determination is clearly erroneous, Schwenke's Petition for Rehearing should be granted.

8. **The Court's determination that the original service of summons and complaint was adequate was erroneous, and was based in part on incompetent evidence.**

In finding that the original service of the summons and complaint--by mail, on December 4, 1990--was adequate, the Court

ignored the fact that the Bar did not even comply with its own rule concerning service. Such service by mailing was required to be made to Schwenke's "last known address as shown by the official roster of attorneys of the Bar." However, Bar Counsel mailed such summons and complaint to 165 South West Temple, Suite 300, Salt Lake City, rather than to the "last known address shown by the official roster of attorneys of the Bar." Accordingly, such service is invalid as a matter of law. Furthermore, the only evidence on which Bar Counsel bases its repeated assertion, that Jamis Johnson assured Bar Counsel he would pass Schwenke's mail on to Schwenke, is incompetent evidence--namely, hearsay evidence contained in an affidavit. (R. 171-172). See, Gunnar

v. Brice, 565 P.2d 1212, 1214 (Wash. App. 1977); Treloggan v. Treloaggan, 699 P.2d 747, 748 (Utah 1985) Norton v. Blackham, 669 P. 2d 857, 859 (Utah 1983)

**CONCLUSION**

Based on the foregoing, Petitioner requests that his Petition for Rehearing be granted.

_____

Paul Johnson, Advisory Counsel,
for Petitioner Pro Se

**RULES OF PROFESSIONAL CONDUCT**
Utah State Bar
Effective January 1, 1988
Preamble: A Lawyer's Responsibilities

**RULE XI**
PROCEEDING ON FORMAL COMMITTEE COMPLAINT

(b) Service, Bar Counsel shall cause to be served upon the attorney in question a copy of the Formal Committee Complaint and a summons, the later of which shall require the attorney to appear and answer said Formal Committee Complaint within 20 days after service. Service shall be made personally upon the attorney in question or by registered or certified mail to the last known address as shown by the official roster of attorneys of the Bar. Three additional days shall be allowed to answer the Formal Committee Complaint in the event

that service is accomplished by mail. Proof of service of the summons and Formal Committee Complaint shall be made by affidavit of the person making such service or by a certificate of mailing by registered or certified mail or by the affidavit of Bar Counsel that such mailing has been accomplished.

UTAH RULES OF CIVIL PROCEDURE

**Rule 4. Process**

(b) **Time of service.** In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court the court allows a longer period of time for good cause shown. If the summons and

complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service had been obtained on one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

(d) **By whom served.** The summons and complaint may be served in this state or any other state or territory of the United States, by the sheriff or constable, or by the deputy of either or by a United States Marshall or by the marshal's deputy, or by any other person 18 years of age or older at the time of service, and not a party to the

action or a party's attorney. of either,

**(e) Personal Service**. Personal service shall be made as follows:

(1) Upon any individual other than one covered by subparagraphs (2) (3) or (4) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or complaint to an agent authorized by appointment or by law to receive service of process;

**(g) Other service**. Where the identity or whereabouts of the person to be served are

unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. If the motion is granted, the court shall order service of process by publication, by mail from the clerk of the court, by other means,

or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. A copy of the court's order shall be served upon the defendant with the process specified by the court.

**RULES OF PROFESSIONAL CONDUCT**
Utah State Bar
Effective January 1, 1988
Preamble: A Lawyer's Responsibilities

**RULE XI**
PROCEEDING ON FORMAL COMMITTEE COMPLAINT

(C) Answer. The attorney in question shall file his answer to the Formal Committee Complaint in writing with the office of the executive Director of the Bar within the time allowed or such further time as the Board upon good cause shown, may grant. The Answer shall admit or deny the allegations of the Formal Committee Complaint and may raise such defenses and motions as are permitted under the Utah Rules of Civil Procedure. A copy of the Answer shall be served upon Bar Counsel who may thereafter file a reply as to new

matters raised by the answer. The Board shall proceed to hear the case on the issues framed by the pleading and motions, if any, and notice shall be given to Bar Counsel and the attorney of the time and place of such hearing.

(d) Default. In the event the attorney fails to file and serve his answer to the Formal Committee Complaint within the time established, he shall be deemed to have admitted the allegations and charges in the said Complaint and the Board shall enter the attorney's default. The Board shall thereupon fix a time and place for hearing, notice of which shall be given to Bar Counsel and the attorney, and shall thereupon proceed to hear and receive evidence and argument with respect to

discipline, if any, to be imposed or recommended.

(h) Filing. The originals of all pleadings, motions, orders, etc., shall be filed with the Executive Director of the Bar, who shall function as clerk in all disciplinary Formal Committee Complaint proceedings. Copies of all such documents shall be mailed or delivered to the attorney or his counsel and all members of the designated hearing committee.

RULE XII

(a) Hearing Committee Panel. All Formal Committee Complaints will be submitted to and heard before a committee of two members of the Bar selected by the Board and one public member appointed by the

Supreme Court. The Board shall appoint twelve members of the Bar to act on the Hearing Committee Panel, consisting of two attorneys from the first and second divisions, two attorneys from the fourth and fifth divisions and, six attorneys from the third division and two at-large attorneys from any divisions. In addition, six public members of the Hearing Committee Panel shall be appointed by the Supreme Court. All regular terms shall be three years, and no member shall serve more than two consecutive three-year terms. Provided, however, for the initial appointments to the Hearing Committee Panel, one member of the Bar from the first and second divisions shall be appointed for one year, and one shall be appointed for three years; one member of the

Bar from the fourth and fifth divisions shall be appointed for two years and one for three years; two members of the Bar from the third division shall be appointed for one year, two shall be appointed for two years and two shall be appointed for three years and the public members shall be appointed one for one year, two for two years and two for three years. The President of the Bar shall assign a hearing committee to a particular case and shall name a hearing committee chairman from the Committee in each case.

(b) Evidence. The rules of evidence and procedure applicable to the conduct of non jury civil trials in the district courts of the state of Utah shall govern the hearing on a Formal Committee Complaint. A

verbatim recording shall be maintained by electronic and/or stenographic means.

(c) Burden and Standard of Proof. The burden of proof shall be on Bar Counsel to sustain the Formal Committee Complaint, or various counts thereof by clear and convincing evidence.

(d) Personal Attendance by the Attorney. Unless excused from attendance by the chairman of the Hearing Committee for good cause shown, the attorney whose conduct is the subject of the hearing shall attend the hearing in person and shall answer any questions put to him by Bar Counsel and the Hearing Committee.

(e) Findings, Conclusions and Recommendation. After the hearing is completed, the Hearing Committee shall make

written findings of fact, conclusions of law and its recommendation as to the discipline of the attorney and shall submit the same to the Board. The Board shall review and consider the findings, conclusions and recommendation of the Hearing Committee determinations in whole or part. The findings, conclusions and recommendation shall then be entered by the Board either dismissing the complaint or recommending disbarment, suspension, probation, public reprimand, restitution and/or costs. A copy of the findings, conclusions and recommendation shall be served upon Bar Counsel and the attorney in question or his counsel.

(f) Petitions for Amendment, Modification or Reconsideration. Within 10

days of service of the Board's findings, conclusions and recommendation, Bar Counsel or the attorney in question may petition the Board to amend, modify or reconsider the findings, conclusions and recommendation. The petition shall be filed with the executive Director of the Bar. The petition shall specify any proposed amendment or modification and any reasons advanced for reconsideration. The petition may be supported by legal argument and may be accompanied by a request for oral argument. The Board shall permit oral argument on the petition if requested.

(g) Transmittal to Supreme Court. Upon all proceedings before the Board having been concluded, in the event that discipline is recommended, a certified copy of the

Board recommendation setting forth the recommended discipline, accompanied by the findings of fact and conclusions of law, shall be forthwith forwarded to the clerk of the Supreme Court, and copies thereof shall be served upon the attorney in question and Bar Counsel.

(h) Public Access to Proceedings. Upon the filing of a Formal Committee Complaint, the pleadings in the matter shall be open to the view of all interested persons. Evidentiary hearings conducted by the Hearing Committee shall be open to the public. The findings of fact, conclusions of law and recommendation of the Hearing Committee and Board shall be open to all interested persons.

(i) Ex Parte Communications

Prohibited. Neither Bar Counsel nor members of the disciplinary staff shall engage in ex parte communications with members of the Board or members of the Hearing Committee concerning any disciplinary case that is being or may be considered by the Board of the Hearing Committee.

**Rule 6. Time**

. . .

(e) **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

**Rule 12. Defenses and objections.**

(a) **When presented.** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of

jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law

or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

**Rule 4-504. Written orders, judgments and decrees.**

**Intent:**

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not

intended to change existing law with respect to the enforceability of unwritten agreements.

**Applicability:**

This rule shall apply to all civil proceedings in courts or record except small claims.

**Statement of the Rule:**

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposes order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court

otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be

made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

(10) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

**63-46b-8. Procedures for formal adjudicative proceedings**

**- Hearing procedure.**

(1) Except as provided in Subsections 63-46b-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows: . . . . . .

(g) The hearing shall be recorded at the agency's expense.

**Rule 81. Appilcability of rules in general.**

(a) **Special statutory proceedings.** These

rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

No._____

**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1993

A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

**AFFIDAVIT OF JAMIS M. JOHNSON**

STATE OF UTAH )
:ss
SALT LAKE COUNTY )

JAMIS M. JOHNSON, after being first duly sworn, deposed, states as follows:

1. I have read the affidavit of Stephen Trost, alleged Bar Counsel for the Utah State Bar in 1990.

2. I dispute each and every allegation contained in Stephen Trost's affidavit.

3. Specifically, I know I did not meet with Stephen Trost in or about December, 1990 or anytime before December 4, 1990.

4. I knew in December, 1990 that A. Paul Schwenke was in the process of moving out of state, but I also knew he did not leave until mid-January, 1991. So, I would not have made any representation on December 4, 1990 that A. Paul Schwenke had left the state because it had not happened yet.

6. I also knew for a fact, that Wilma Schwenke, Paul Schwenke's ex-wife, was still doing accounting work at my office in December, 1990 and did not leave for Las Vegas until February, 1991. Therefore, I could not have made a statement on December 4, 1990 about Wilma's address in Las Vegas

because it hadn't happened yet and I don't have a crystal ball.

Dated this 13th day of June, 1994.

JAMIS M. JOHNSON

SUBSCRIBED AND SWORN TO BEFORE ME, this 13th day of June, 1994

Notary Public
DEBORAH L. DOHERTY
10 West Broadway
Salt Lake City, Utah 84101
My Commission Expires
February 28, 1996
State of Utah

NOTARY PUBLIC, residing in Salt Lake County.

My Commission expires:
2/28/96

A. Paul Schwenke #3951
Attorney Pro Se
75 East 400 South #300
Salt Lake City, Utah 84101
Telephone: 801 530-0100

IN THE UTAH SUPREME COURT

In the Matter of the
Complaint by CAREN SERR,

BRIEF OF
PETITIONER.

against

PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

Petitioner,

No. 920480

vs.

Case Number below:
F-322

Utah State Bar,

Priority 5

Respondent.

PARTIES

John C. Baldwin
Executive Director
Board of Bar Commissioners
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

Wendell K. Smith
Office of Bar Counsel
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111

A. Paul Schwenke
Petitioner
75 East 400 South, #202
Salt Lake City, Utah 84111



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## JURISDICTION OF THE SUPREME COURT

Appellate jurisdiction is proper pursuant to the following authorities:

1. Rule XIV(a), Procedure of Discipline of the Utah State Bar.
2. Constitution of Utah, Art. VIII, 4.

## ISSUES PRESENTED ON APPEAL

1. Is the delay of 9 days in filing Petitioner's Answer to the Formal Complaint, caused wholly by Petitioner's mistake in inadvertently placing the original and copy of the Answer in his file rather than in the envelope containing a copy of the Memorandum of Law for the Special Master, a Notice of Suspension, and the Notice of Compliance with Rule XVIII which envelope the Petitioner delivered to Bar Counsel at the Law and Justice Center on July 17, 1992,1 such an unreasonable and inexcusable delay to penalize petitioner by entering a Default Order against him?

Applicable standard of appellate review and supporting authority: Since the Board of Bar Commissioners failed to

rule on Petitioner's Motion to Set Aside the Default Certificate, the standard of review should be that applicable to the lower courts, that is, the court should be liberal in granting relief against judgments taken by default so that the controversies may be tried on the merits. Additionally, the policy codified in Rule 60(b),

The confusion was apparently the result of Petitioner being overly cautious not to put the Answer in the envelope intended for the Special Master. Utah R.Civ.P. should be controlling, that is, a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief. State by and thru. Depart. of Social Services v. Mussel man, 667 P.2d 1053 (Utah

1983) and May v. Thompson, 677 P.2d 1109 (Utah 1984).

2. Is the time for Petitioner to file an Answer to the Formal Complaint tolled and did not start to run until and after the Board of Bar Commissioners deny, on August 10, 1992, Petitioner's Objection to the Order, prepared by Bar Counsel, granting Petitioner's Motion for Reconsideration?

Applicable standard of appellate review and supporting authority: The standard of review should be that applicable to the lower courts, that is, the court should be liberal in granting relief against judgments taken by default so that the controversies may be tried on the merits. Additionally, the policy codified in Rule

60(b), Utah R.Civ.P. should be controlling, that is, if a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief. State by and thru. Depart. of Soci Services v. Musselman, 667 P.2d 1053 (Utah 1983) and May v. Thompson 677 P.2d 1109 (Utah 1984).

3. Is al the Board of Bar Commissioner's Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline premature in that the Board of Bar Commissioners still has pending before it petitioner's Motion to Set Aside the Default Certificate?

Applicable standard of appellate review and supporting authority: The standard of review should be that applicable

to the lower courts, that is, the court should be liberal in granting relief against judgments taken by default so that the controversies may be tried on the merits. Additionally, the policy codified in Rule 60(b), Utah R.Civ.P. should be controlling, that is, if a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief. State by and thru. Depart. of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983) and May v. Thompson, 677 P.2d 1109 (Utah 1984).

4. Is the proceedings against Petitioner arising from the claim of Caren Serr barred by the four year statute of limitation? The record lacks facts sufficient to a determination of this issue.

Accordingly, Petitioner will not address this issue in this brief but instead, Petitioner respectfully requests that this issue be remanded to afford Petitioner the opportunity to present supporting evidence.

RULE DETERMINATIVE OF THE ISSUES PRESENTED

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... Rule 60 (b)(1), Utah Rules of Civil Procedures. (Emphasis added).

## STATEMENT OF THE CASE

This petition is to review the propriety of the failure of the Board of Bar Commissioners to hear Petitioner's Motion to Set Aside the Default Certificate and to review the adequacy of the grounds offered by Petitioner as basis for this Court to set aside the Default Certificate and the Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline.

### I. OBJECTION TO THE RECORD

Petitioner objects to the record as certified to the court on the following grounds: (1) The record is incomplete because it does not include Petitioner's responses to the Notice of Complaint and the Order Affirming Findings of Fact, Conclusions of Law and Recommendation of

Discipline, which was vacated as a result of Petitioner's Motion for Reconsideration. (2) The record is unfair and prejudicial because it included matters totally unrelated to the pending case: (a) and an allege letter from a Ron Serr (Record, pages 18, 19 and pages 169, 170); the Formal Complaint in F-478 matter (Record, pages 60 through 70); judgment and related findings in a civil case, Serr v. A. Paul Schwenke and Bruce Udall (Record pages 40 through 49) and unrelated correspondents (Record, pages 176 through 178). (3) The record is also unfair and prejudicial because it included several copies of the Formal Complaint giving its unproven allegations undue emphasis (Record pages 2 through 10, pages 51 through 59,

pages 153 through 162. (4) The order of the documents and entries in the record are misleading. For example, the Motion to Set Aside Default

Certificate (Record, pages 102 and 103) appears before the series of documents in connection with the Motion for Reconsideration (Record, pages 104 through 127), thus giving the false impression that the Motion to Set Aside Default Certificate had been heard by the Board of Bar Commissioners. Additionally, there are five Default documents (Record, pages 24 and 25; pages 26 and 27; pages 98 through 99; pages 179 and 180; and pages 230 through 231), clearly giving the false impression that Petitioner had been defaulted five times when in fact, it was only once when the Petitioner was out of the country and the 9 day delay in filing Petitioner's Answer due to a clear and undisputed mistake

and inadvertence by Petitioner.

II. CONCISE STATEMENT OF MATERIAL FACTS.

A. Facts leading to the first default certificate.

1. Petitioner left the State of Utah in the middle ofJanuary, 1991. Record, page 124.

2. On March 19, 1991, a default for failure to answer the Formal Complaint was entered against the Petitioner while he was out of the country. Record, page 24. Another Default Certificate was entered 9 days later on March 28, 1991. Record, page 26.

3. A Sanctions hearing was requested on March 28, 1991 (Record, page 28) and a Notice of Hearing was set on May 24, 1991 (Record, page 30) for a trial set for July

22, 1991. Record, page 30.

4. On July 16, 1991, and prior to the scheduled hearing set for July 22, 1991, Bar Counsel moved to continue the hearing for 30 isle days to allow the Office of ~ar Counsel to perfect service upon Petitioner. Record, page 31. There is no Order granting or denying Bar Counsel's Motion.

5. On November 22, 1991, Wendell K. Smith, Assistant Bar Counsel filed a Request for Sanctions Hearing (Record, page 75) and a hearing was set for March 2, 1992 (Record, page 79).

6. Petitioner was informed of the scheduled hearing when he returned to the State in February, for a preliminary hearing in the Third District Court. Petitioner appeared at the Sanctions hearing on March

2, 1992 and voiced his objections to the proceedings.

7. On March 16, 1992, Petitioner moved the Board of Bar Commissioners to hold all pending matters in abeyance during the pendency of a pending criminal case against Petitioner. Record, pages 82 and 83.

8. On May 4, 1992, the Board of Bar Commissioners denied Petitioner's Motion to Hold Matters in Abeyance. Record, pages 197 through 199.

9. On May 5, 1992, Petitioner filed his Motion for Reconsideration of the Order Affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline (the missing Order) Record, pages 110 and 200; with a supporting memorandum (Record, pages 111 through 123 and pages 201

through 211) and supporting affidavits (Record, pages 124 through 126). Petitioner sought the following remedy: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and proper service of the Summons an Complaint upon the Respondent". The Petitioner's Motion was granted after a hearing before the Board of Bar Commissioners.

10. On June 8, 1992, The Board of Bar Commissioners entered an Order, prepared by Assistant Bar Counsel, Wendell K. Smith, granting Petitioner's Motion for Reconsideration. Record, pages 213 through 221. The Order was served upon Petitioner by mail on June 16, 1992. Record, pages

200 and 221. The Order clearly failed to accurately reflect the sum and substance of Petitioner's Motion and the remedy sought which had been granted.

7. On June 29, 1992, Petitioner timely filed his Objection to the Order that had been signed on the ground that the Order failed to properly reflect the mayoralties of the matter before the Board of Bar Commissioner. Record, pages 222 through 224. Since the Order erroneously required the Petitioner to file an Answer, Petitioner also filed a Motion to Quash the Summons. Record, pages 225 through 226.

B. Facts leading to the second Default Certificate.

8. On July 7, 1992, Petitioner was personally served with the Summons and

Formal Complaint in this matter while Petitioner's Objections to the Order granting Petitioner's Motion was still pending. Record, pages 92 and 93, pages 132 through 134, and pages 227 through 229. Petitioner's Answer was due July 27, 1992.

9. On July 9, 1992, Petitioner appeared before a Special Master by order of the Supreme Court on two charges of contempt on an unrelated matter. After the hearing, the Special Master

requested a memorandum of law from Petitioner. Recordpages 102 and 103.

10. Beginning on July 14, 1992 through July 17, 1992, Petitioner prepared the Memorandum of Law for the Special Master, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint in this matter. Record, pages 102 and 103.

11. On July 17, 1992, Petitioner took the final drafts of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the Answer to the Formal Complaint in this matter, for copying. After copying, Petitioner thought he placed a copy of the Memorandum of Law, the Notice of Suspension, the Notice of Compliance with Rule XVIII and the original

and a copy of the Answer in a large envelope which he hand-delivered to the Office of Bar Counsel, the same day. Record, pages 102 and 103.

12. Unfortunately, Petitioner was mistaken because he inadvertently put the original and copy of the Answer back in his file. Record, pages 102 and 103.

13. On August 5, 1992, after receiving a copy of Bar counsel's Request to enter Default, Petitioner checked his file and discovered his mistake. Petitioner also immediately filed his Answer, although, it was 9 days late. Record, pages 102, 103 and pages 135 and 136.

14. On August 10, 1992, the Board of Bar Commissioners denied Petitioners

Objection to the Order Granting Petitioner's Motion to Reconsider on the ground that petitioner's Objection was moot by the personal service of the Summons and Formal Complaint upon Petitioner on July 7, 1992. Record, page 137.

15. Also on August 10, 1992, unbeknownst to Petitioner, Assistant Bar Counsel, Wendell K. Smith, filed his Motion to Affirm the Findings of Fact, Conclusions of Law and Recommendation of Discipline. Record, pages 144 through 151.

16. On August 11, 1992, after a futile effort to convince Assistant Bar Counsel, Wendell Smith, to stipulate to set aside the Default Certificate, Petitioner filed his Motion to Set Aside the Default Certificate. Record, pages 102 and 103.

17. On September 3, 1992, the Board of Bar Commissioners entered its Order Affirming Findings'of Fact, Conclusions of Law and Recommendation, notwithstanding that Petitioner's Motion to Set Aside the Default Certificate, was still pending. Record, pages 142 and 143.

C. Facts bearing on Petitioner's meritorious defense.

18. The Board of Bar Commissioners failed to hear Petitioner's Motion to Set Aside the Default Certificate, thus, Petitioner did not have an opportunity to present evidence in support of his claim to a meritorious defense. Accordingly, the Petitioner's Answer denying each and every charging allegation of the Formal Complaint should be sufficient to raise a meritorious

defense for purposes of setting aside the Default Certificate.



## SUMMARY OF ARGUMENTS

1. Under Point One: The genel policy codified in Rule 60(b), Utah Rules of Civil Procedure is controlling in this case. That policy requires this court to set aside the Petitioner's default and the resulting Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline if the default was the result of Petitioner's mistake. Additionally, the requirements for timeliness of the Motion to Set Aside the Default, the uncontroverted mistake by Petitioner, and a meritorious defense are all met in this case, thus, compelling this court to vacate

the Board of Bar Commissioners Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline, the Default Certificate and remand this matter tar a trial on the merits.

2. Under Point Two: It is fundamentally unfair and reversible error for the Board of Bar Commissioners to ignore Petitioner's Motion to Set Aside the Default Certificate. It is also fundamentally unfair that the Board of Bar Commissioners would enter a Default Certificate in this case where the Default Certificate was presented to the Board of Bar Commissioners before it had ruled on Petitioner's Objections to the Order granting Petitioner's Motion ~or Reconsider·ation.

## ARGUMENT

THE DEFAULT AND RESULTING ORDER AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DISCIPLINE MUST BOTH BE SET ASIDE UNDER RULE 60(b), UTAH RULES OF CIVIL PROCEDURE FOR MISTAKE, INADVERTENCE.

A. The default was a direct result of a mistake and inadvertence.

Rule 60(b)(1), Utah Rules of Civi; Procedures is determinative of the issues presented on this appeal. Rule 60(b)(1) states, in part:

> On Motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representatives from the final judgment, order or proceeding for the following reasons: (1) mistake. inadvertence, surprise, or excusable neglect. (Emphasis added).

This court has held that Rule 60(b), Utah Rules of Civil Procedures, is a codification of the principal"that if default is issued when a party qenuinely is

mistaken to a point where. absent such mistake. default would not have occurred. the equity side of the court would grant relief. Such principal is codified in such Rules as 60(b), Utah R.Civ.P., reflecting that which is inherent in the judicial process." May v. Thompson, 677 P.2d 1109 (Utah 1984) (Emphasis added). The instant case is clearly on all fours with the policy acknowledged by this court as stated above. The Petitioner was served with the Summons and Formal Complaint on July 7, 1992. Record, pages 92, 93; 132 through 134; and 227 through 229. The Answer to the Formal Complaint was due on July 27, 1992. Between July 14, 1992 and July 17, 1992, Petitioner prepared the Answer in this matter, and three more documents, to wit: (1) a

Memorandum of Law in support of Petitioner's opposition to two charges of contempt of the Supreme Court to be presented to the Special Master, (2) a belated Notice of Suspension pursuant to Rule XVIII of the Procedure of Discipline of the Utah State Bar, and a (3) Notice of Compliance with Rule XVIII of the Procedure of Discipline of the Utah State Bar. Petitioner took all four documents for copying prior to serving them upon Bar Counsel. Record, pages 102 and 103.

After copying the four documents, petitioner put copies of each document in a large envelope to be delivered or served upon Bar Counsel. Petitioner also placed copies Original and copies of the other three documents in an envelope for the

Special Master. Unbeknownst to petitioner, he inadvertently placed the original and copy of the Answer back in his file. Record, pages 102 and 103.

Petitioner was not aware of his mistake until, August 5, 1992 when he received a copy, in the mail, of Bar Counsel's Request to Enter Default. Petitioner immediately filed the Original of the Answer and served a copy upon Mr. Wendell Smith, Assistant Bar Counsel. Record, pages 102, 103 and 135 and 136.

But for, Petitioner's mistake and inadvertence, the Answer to the Formal Complaint would have been timely filed on July 17, 1992; and accordingly, there would have been no default.

The petitioner's inadvertence in

misplacing the Original and copy of the Answer, intended for service upon Bar Counsel and Bar Director, resulting in a 9 days delay in filing the Answer, is exactly the type of mistake that Rule 60(b)(1) is meant to correct. As soon as petitioner discovered his mistake, he acted immediately to rectify the mistake by filing his Answer to the Formal Complaint. This court favors granting relief from a default judgment where any reasonable excuse is cffered by the defaulting party. Board of Education v. Cox, 384 P.2d 806 (Utah 1963). The petitioner has clearly met the threshold to be entitled to relief from the Default Certificate and the resulting Order affirming the Findings of Fact, Conclusions of Law and Recommendation

of Discipline.

B. Petitioner's Motion to Set Aside the Default Certificate was timely.

Rule 60(b), Utah Rules of Civil Procedures, requires that a Motion based on category (1) for mistake, inadvertence, ... must be brought no more than three months after the order was entered. The Petitioner's Answer was filed 9 days late. The Default Certificate was entered on July 31, 1992. Record, page 97. Petitioner's Motion to Set Aside the Default Certificate was filed 11 days later, on August 11, 1992. Accordingly, the Petitioner's Motion to Set Aside Default Certificate was timely filed.

C. Petitioner's denial of the charging allocations of the Formal Complaint sufficiently raised a meritorious defense.

As demonstrated above, but for,

Petitioner's mistake in misplacing the Answer to the Formal Complaint, there would have been no default. Secondly, the Petitioner's Motion to Set Aside the Default Certificate was timely. If the Motion is timely and Petitioner has shown excusable neglect, the next requirement is a 16 showing of a meritorious defense. State by and thru. Depart. of Social Services v. Mussel man, 667 P.2d 1053 (Utah 1983).

The Board of Bar Commissioners failed to hear Petitioner's Motion to Set Aside the Default Certificate, thus, Petitioner did not have an opportunity to present evidence in support of his claim to a meritorious defense. Accordingly, the Petitioner's Answer denying each and every charging allegation of the Formal Complaint should be

sufficient to raise a meritorious defense for purposes of setting aside the Default Certificate.

POINT TWO

THE PROCEDURE LEADING UP TO THE ORDER AFFIRMING THE FINDINGS OF FACT. CONCLUSIONS OF LAW. AND RECOMMENDATION OF DISCIPLINE WAS DEFECTIVE FOR TWO REASONS.

The Board of Bar Commissioners' ~aste to affirm th Findings of Fact, Conclusions of Law and Recommendation of Discipline ignores some basic fundamental principles of justice and fair play. The Board of Bar Commissioners entered its final Order Affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline notwithstanding that Petitioner's Motion to Set Aside the Default Certificate was still pending. Secondly, the Board of Bar

Commissioners enters its final Order Affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline notwithstanding that it was clear from the face of the pleadings that the default may have been improperly entered.

A. The Board of Bar Commissioners failed to hear Petitioner's timely filed Motion to Set Aside Default Certificate.

The Board of bar Comissioners have before it Petitioner's

timely filed Motion to Set Aside the Default Certificate. The Motion to Set Aside Default Certificate was filed on August 11, 1992. Record, pages 102 and 103. The Board of Bar Commissioners affirmed the Findings of Fact, Conclusions of Law and Recommendation of Discipline on September 3, 1992 (Record, pages 142 and 143) and ignoring the Petitioner's Motion to Set Aside the Default Certificate. It is fundamentally unfair that Petitioner is forced to expend time and money to appeal a matter that had been properly placed before the Board of Bar Commissioners and it chose to ignore it. The Petitioner respectfully prays the Court correct the injustice visited upon Petitioner and reverse the Order Affirming Findings of Fact,

Conclusions of Law and Recommendation of Discipline and remand the case for a trial on the merits.

B. The Petitioner's time to answer the Formal Complaint should not have run until 10 days after the denial of Petitioner's Objection to the Order granting Petitioner's Motion for Reconsideration.

On or about May 4, 1992, the Board of Bar Commissioners signed an Order Affirming the Findings, Conclusions and Recommendations of the Hearing Panel in this matter (the missing Order). On May 5, 1992, Petitioner filed a Motion for Reconsideration of said Order. Petitioner sought the following remedy: "to have the proposed Findings of Fact, Conclusions of Law and Recommendation of Discipline dismissed, the default vacated, and Bar Counsel ordered to effectuate adequate and

proper service of the Summons and Complaint upon the respondent". Record, pages 110 and 200. On May 19, 1992, Petitioner filed his memorandum of law in support of his Motion for Reconsideration and supporting affidavits. Record, 18 pages 111 through 126 and Pages 200 through 211. Petitioner~s motion was granted.

On June 8, 1992, The Board of Bar Commissioners signed an Order prepared by Bar Counsel granting Petitioner's Motion for Reconsideration. Record, pages 213 through 221. The Order clearly did not conform to the remedy that Petitioner sought in his Motion for Reconsideration which had been granted. on June 29, 1992, Petitioner filed his Objection to the Order that had been signed on the ground that the Order

failed to properly reflect the merits of the matter before the Board of Bar Commissioner. Record, pages 222 through 224. Since the Order erroneously required the Petitioner to file an Answer, Petitioner also filed a Motion to Quash the Summons. Record, pages 225 through -226.

Bar Counsel circumvented Petitioner's Objection by personally serving the Summons and Formal Complaint upon the Petitioner on July 7, 1992 before the Board of Bar Commissioners had ruled on Petitioner's Objection. Record, pages 92 and 93; pages 132 through 134; and pages 227 through 229. On August 10, 1992, the Board of Bar Commissioners over-ruled Petitioner's Objection on the ground that it was moot, since Petitioner had been personally served

on July 7, 1992. Record, page 137.

Because the issue of Service of the Summons and Formal Complaint was properly before the Board of Bar Commissioners on Petitioner's Objections to the Order granting Petitioner's Motion for Reconsideration, it is only fair that Petitioner's time to answer the Formal Complaint should not run until after the Board of

Bar Commissioners rule on the Objection. This situation parallels a Motion under Rule 12, Utah Rules of Civil Procedure. While the motion is pending before the court, the parties remain in status quo until the court rules on the motion. If the Rule 12 Motion is denied, the defendant is allowed 10 days from the date of the Order denying the motion to file his Answer to the Complaint.

The Board of Bar Commissioners denied Petitioner's Objection on August 10, 1992. Record, pages 102 and 103. Accordingly, the time for petitioner to answer the Formal Complaint would not have run until August 20, 1992. Thus, the August 5, 1992 filing date was clearly timely.

CONCLUSION

Rule 60(b)(1), Utah Rules of civil

Procedure is controlling and should be invoked to reverse the Board of Bar Commissioner's Order affirming the Findings of Fact, Conclusions of law and Recommendation of Discipline on the basis of mistake and inadvertence. The defects in the procedure before the Board of Bar Commissioners also requires a reversal of its Order affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline and the Default Certificate.

Dated this, day of February, 1993.

_____

A. Paul Schwenke

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered 4 opies of the foregoing Brief of Petitioner to Mr. Wendell K. Smith,

Assistant Bar Counsel at 645 South 200 East, Salt Lake City, Utah 84111, and the original and 9 copies to Honorable Geoffrey J. Butler, Clerk of the Supreme Court, at 332 State Capitol, Salt Lake City, Utah 84114, this day of February, 1993.

_____

A. Paul Schwenke

IN THE SUPREME COURT OF THE STATE OF UTAH

| | |
|---|---|
| A. PAUL SCHWENKE, | PETITIONER'S REPLY BRIEF |
| Petitioner | No. 920480 |
| UTAH STATE BAR, | Case No. Below: F-322 |
| Respondent. | Priority 5 |

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DISCIPLINE BY THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR.

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Petitioner.

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Wilde v. Mid-Century Ins. Co., 635 P.2d 417,419 (Utah 1981) . . . . . 6

Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978). . . . . 6

ISSUES RAISED BY RESPONDENT'S BRIEF

Respondent's brief raised six issues restated here as follows:

1. Was Appellant properly served with the Summons and Formal Complaint in the above-entitled action? The documents were sent by certified mail to his last known actual address on December 4, 1990, which was approximately six (6) weeks before he left the State of Utah.

2. Was Appellant properly served with the Summons and Formal Complaint, Notice of Intent to Default, and Default, when the documents were sent by certified mail to his

last known actual address with arrangements having been made to have such documents forwarded to Appellant?

3. Can Appellant defeat service of the Summons and Formal Complaint, Notice of Intent to Default, and Default in this disciplinary action by leaving the State of Utah and failing to keep the Bar informed as to his location and current address?

4. Was the finding of the Hearing Panel and the Board of Bar Commissioners that the Appellant had been properly served with the Summons and Formal Complaint when they were sent by certified mail to Appellant's last known address clearly erroneous?

5. Was the decision of the Board of Bar Commissioners to approve the

Findings, conclusions, and Recommendations of the Hearing Panel after Appellant's second default clearly erroneous?

6. Was the Appellant, notwithstanding his default, afforded a fair hearing on the merits of this complaint?

Of the six issues raised, only issue #5 is relevant to this appeal. Issue #5 is addressed in Petitioner's brief and will not be further addressed here. Issues 1, 2, 3, 4, and 6 raised matters that had been before the Board of Bar Commissioners ("Board") and after a hearing the Board adjudicated said issues in favor of Petitioner. The time for Respondent to appeal the Board's adjudication of said issues has long pass and the Respondent is barred from raising them here. Accordingly, the issues to be

addressed in this Petitioner's Reply Brief are as follows:

1. Is respondent barred from raising issues #1, 2, 3, 4, and 6 by the applicable statute of limitation and doctrine of waiver?

2. Is respondent barred from raising issues #1, 2, 3, 4, and 6 by the doctrine of resjudicata or collateral estoppel?

CONCISE STATEMENT OF APPLICABLE FACTS

1. Following a sanctions hearing before the Hearing Panel on March 2, 1993 and the service of the panel's Findings, Conclusions and Recommendation, Petitioner timely file pursuant to Rule XII, Procedures of Discipline of the Utah State Bar, a Motion for Reconsideration. Record, pages

110 and 200. Appendix A. Petitioner also submitted a supporting memorandum. Record, pages 111 through 123 and pages 201 through 211. Appendix B(1,2&3)

2. Issues 1, 2, 3, 4 and 6 raised by Respondent here were all properly before the Board pursuant to Petitioner's Motion for Reconsideration below.

3. After a full hearing wherein Bar Counsel made the same arguments that he is raising as issues 1, 2, 3, 4 and 6 here, the Board rejected Bar Counsel's argument and granted Petitioner's Motion for Reconsideration on June 8, 1992. Record, pages 213 through 221. Appendix C.

4. The last day to appeal the Board's order granting Petitioner's Motion for Reconsideration was July 7, 1992

pursuant to Rule XIV, Procedures of Discipline of the Utah State Bar.

## ARGUMENT

1. **Respondent, Utah State Bar, is barred by the statute of limitation and the doctrine of waiver from asserting issues 1, 2, 3, 4 and 6.**

Rule XIV, Procedures of Discipline of the Utah State Bar provides for review by the Supreme Court of findings, conclusions and recommendations of the Board. The rule sets for a limitation period of 30 days for which the attorney subject to the disciplinary proceeding or bar counsel to appeal the rulings of the Board.

> (a) Review on appeal. Within 30 days after service of findings, conclusions and a recommendation of the Board upon the attorney in question and Bar Counsel, the attorney or Bar Counsel (the latter acting at the express

direction of the Committee) may seek review by the Supreme Court by a written notice of appeal with the Clerk of the Supreme Court...

On June 8, 1992 and after a full hearing by the Board of the Petitioner's Motion for Reconsideration, wherein Bar Counsel made the same arguments that it is now attempting to raise on this appeal as issues 1, 2, 3, 4 and 6, the Board rejected said arguments and granted Petitioner's Motion for Reconsideration vacating the previously entered default and Hearing Panel's Findings, Conclusions and Recommendation. The latest date for Bar Counsel to file its Notice of Appeal of said ruling was July 7, 1992. Bar Counsel choose not to appeal said ruling but instead proceeded with personal service of the

summons and formal complaint on Petitioner on July 7, 1993.

Accordingly, Respondent is barred by Rule XIV from asserting issues 1, 2, 3, 4 and 6 on this appeal. Furthermore, Bar Counsel waived any objections to the Board's determination of said issues when Bar Counsel chose to serve Petitioner with the summons and complaint rather than filing a Notice of Appeal.

2. Respondent, Utah State Bar, is barred by the doctrine of Collateral Estoppel from asserting issues 1, 2, 3, 4 and 6.

The doctrine of collateral estoppel or more accurately described as the issue preclusion branch of the doctrine of re judicata is well settled and recognized in this state. Madsen v. Borthick, 769 P.2d

245 (Utah 1988) citing Noble v. Noble, 761 P.2d at 1374 n.5; Wilde v. Mid-CenturY Ins. Cco., 635 P.2d 417, 419 (Utah 1981) and Searle Bros. ~v. Searle, 588 P.2d 689, 691 (Utah 1978). The doctrine serves to bar subsequent relitigation of issues previously decided in another action where four requirements are met. First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and competently litigated in the first action, and fourth, the parties must be the same or their privies.

The parties before the Board and this court are identical. The matter was fully briefed and a full two to three hour hearing was conducted before the Board. The

Board's findings and conclusions granting Petitioner's Motion for Reconsideration and vacating the first default was final. The issue before the Board and the issues 1, 2, 3, 4 and 6 raised by Respondent here are identical. The Petitioner's Motion for Reconsideration before the



Board below was based primarily on his challenge to the entry of default and all proceedings pursuant to the improperly entered default. Bar Counsel opposed the Motion for Reconsideration raising, among other arguments, the same arguments that Respondent now is raising here as issues 1, 2, 3, 4 and 6. Notwithstanding Bar Counsel's opposition, the Board correctly granted Petitioner's Motion for Reconsideration and

vacated the default and all proceedings pursuant thereto, i.e. the sanctions hearing and the Hearing Panel's Findings, Conclusions and Recommendation. Accordingly, these issues (Respondent's issues 1, 2, 3, 4 and 6) are barred from consideration on this appeal by the doctrine of collateral estoppel.

CONCLUSION

Respondent's issues 1, 2, 3, 4 and 6 raised in Appellee's brief re-visiting matters that had been fully and fairly adjudicated by the Board are barred by the statute of limitation, doctrine of waiver, and the doctrine of collateral estoppel.

Dated this 30th day of August, 1993.

_____

A. Paul Schwenke
Petitioner

CERTIFICATE OF MAILING

I hereby certify that I hand-delivered 4 copies of the foregoing Petitioner's Reply Brief to Mr. Wendell K. Smith, Assistant Bar Counsel at 645 South 200 East, Salt Lake City, Utah 84111, and the original and 9 copies to Honorable Geoffrey J.Butler, Clerk of the Supreme Court, at 332 State Capitol, Salt Lake City, Utah 84114, this 30th day August, 1993.

_____

A. Paul Schwenke

A. Paul Schwenke #3951
Attorney Pro Se
75 East 400 South #203
Salt Lake City, Utah 84101
Telephone: 801 530-0100
Telecopier: 801 530-0900

IN THE UTAH SUPREME COURT

| | |
|---|---|
| In the Matter of the Complaint by CAREN SERR, against A. PAUL SCHWENKE, DOB: 10-12-51 ADM: 05-09-83 Petitioner, vs. Utah State Bar, Respondent. | **MOTION TO STRIKE APPELLEE'S BRIEF.** No. 920480 Case Number below: F-322 |

A. Paul Schwenke, Petitioner, appearing Pro Se, respectfully moves the court, pursuant to Rules 23 and

24, Utah Rules of Appellate Procedure, to strike Appellee's brief and Supplement on the ground that Appellee's brief is in violation of Rule 24 (e). Further, Petitioner moves for an award of attorney fees under Rule 24(k). As further grounds, Petitioner alleges that Appellees violation of Rule 24(e) has caused him unfair prejudice and disadvantage. The Appellee has presented numerous factual assertion not contained in the record before the court and any facts that maybe part of the record are not cited to, thus living petitioner to wonder if these facts are truly before the court.

Accordingly, if the court considers the evidence relied on by Appellee, Petitioner will be prejudiced and put at a substantial

disadvantage because some if not most of the evidence relied upon by the Appellee may or may not be before the court. If Appellee is permitted to do so, than it is only fair that petitioner submit any extraneous evidence that would be helpful to his cause. Naturally, such an unmanageable outcome is the wisdom in Rule 23(e) to restrict the parties to the record. Since Appellee clearly violated Rule 23(a) by failing to cite to the record, the Appellee's brief should be stricken and Petitioner awarded his attorney fees. In this respect, petitioner alleges that one hour of attorney time was spend to prepare this motion at the fair rate of $120.00 per hour and copy costs of $2.00.

Respectfully submitted this __ day of

May, 1993.

A. Paul Schwenke

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage pre-paid, copies of the foregoing Memorandum of Points and Authorities in Support of Petitioner's Motion to Strike Appellee's Brief and for Attorney Fees to Mr. Wendell K. Smith, Assistant Bar Counsel, and to the Executive Director, both at 645 South 200 East, Salt Lake City, Utah 84111, this __ day of May, 1993.

Wendell K. Smith #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
S.L.C., Ut. 8411-3834
801-531-9110

IN THE SUPREME COURT
OF THE STATE OF UTAH

| | |
|---|---|
| In the Matter of the Complaint by | ) RESPONSE TO ) APPELLANT'S ) MOTION TO STRIKE ) APPELLEE'S BRIEF |
| against | ) F-322 |
| A. PAUL SCHWENKE<br>DOB: 10-12-51<br>ADM: 05-09-83 | ) |

THE OFFICE OF BAR COUNSEL by and through Wendell K. Smith, Assistant Bar Counsel, submits the following response in objection to Appellant's Motion to Strike Appellee's Brief.

Appellant has made the general

allegation that Appellee has not complied with Rule 24(e) of the Utah Rules of Appellate Procedure. However, Appellant has not identified any specific instances where this has occurred, has not identified alleged factual assertions that are not in the record, and has not specified how he has been unfairly prejudiced and damaged. Consequently, the Office of Bar Counsel cannot respond to these allegations.

The brief submitted by Appellee referred to the record of the March 2, 1992, hearing which apparently had not been paginated pursuant to Rule 11(f), otherwise, all references were to appendices of Appellee's Brief, or to matters contained in Appellant's Brief. Appellant was provided a copy of Appellee's Brief with Appendices.

If he believed that Appellee's Brief contained matters that were not of record, or that he had somehow been prejudiced by the format of Appellee's Brief, he should have submitted these matters in a reply brief.

The Office of Bar Counsel prays that Appellant's motion be denied.

Dated this 11th day May, 1993.

OFFICE OF BAR COUNSEL

_____

Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Response to Appellant's Motion to Strike Appellee's Brief to A. Paul Schwenke, at 75 East 400 south #202, SLC, Ut. 84111, on this 12th day of May, 1993.

_____

IN THE SUPREME COURT
STATE OF UTAH
332 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

JUNE 21, 1993

OFFICE OF THE CLERK

---

A. Paul Schwenke
Attorney at Law
75 East 400 South, #202
Salt Lake City, Utah 84111

In re: A. Paul Schwenke
F-322 No. 920480

Motion to strike appellee's brief is denied. Appellee is ordered to file an amended brief correcting the deficiencies.

Motion to award attorney's fees is denied.

Geoffrey J. Butler
Clerk

Wendell K. Smith, #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

---

In the Matter of the
Complaint by

CAREN SERR
against

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

AFFIDAVIT OF
JAMES Z. DAVIS

F-322

---

STATE OF UTAH :
ss
COUNTY OF SALT LAKE :

The affiant, James Z. Davis, being first duly sworn deposes and states:

1. I am an attorney admitted to practice law in the State of Utah.

2. I was the President of the Utah

State Bar and presiding at the meeting of the Board of Bar Commissioners of the Utah State Bar on May 28, 1992. On that date Respondent appeared before the Board to present oral argument on his Motion for Reconsideration wherein he sought to have the Board to Reconsider the Order entered by the Board on May 4, 1992, affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline entered by the Hearing Panel in this action.

3. Respondent raised two issues in his Motion. He alleged that the proceedings were defective because he and [sic] not been served with the summons and formal complaint by mailing a copy to his last known address as shown on the roster of attorneys of the Bar and that the action of the Hearing Panel

which considered his case on March 2, 1992, was based on racial prejudice.

4. During the hearing before the Board Respondent withdrew his allegation that the decision of the Hearing Panel was based on racial prejudice. This left only the issue regarding service of process.

5. Respondent admitted that he was present at the hearing on his case on March 2, 1992, that he participated in that hearing and presented matters in his own defense.

6. Respondent admitted that he now had in his possession a copy of the summons and formal complaint issued against him in the above-entitled action.

7. The Board found that Respondent had been properly served by mailing a copy

of the summons and formal complaint to the office of Jamis Johnson where Respondent had been practicing law and where arrangements had been made by Bar Counsel to have the documents forwarded to Respondent. The Board found that Respondent currently had possession of a copy of the summons and formal complaint, was aware of the nature of the charges against him, that he had already participated in a trial on the merits of his case and had the opportunity to present matters in defense, extenuation, and mitigation, and that he was not entitled to the relief he requested as a matter of law. However, the Board concluded in the interests of fairness they would grant him a second hearing on his case at such time as he filed his Answer. Accordingly, he was

ordered to file his Answer to the formal complaint within ten (10) days.

8. Neither Respondent or a representative of the Office of Bar Counsel was present during the deliberations of the Board regarding Respondent's Motion.

9. When the decision was reached I instructed Assistant Bar Counsel, Wendell K. Smith, to draft the Findings of the Board and an Order based upon the decision of the Board. Attached to this Affidavit as Exhibit A, and incorporated herein, is a copy of the Order I signed on June 8, 1992, and it accurately reflects the decision of the Board of Bar Commissioners.

Dated this 12 day of November, 1992.

_____

James Z. Davis

Subscribed and sworn before me this 12th day of November, 1992.

_____

Notary Public
Residing in Weber County

SEAL

Wendell K. Smith, #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

---

In the Matter of the
Complaint by

CAREN SERR
against

A. PAUL SCHWENKE,
DOB: 10-12-51
ADM: 05-09-83

AFFIDAVIT OF
JAMES Z. DAVIS

F-322

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STATE OF UTAH :
ss
COUNTY OF SALT LAKE :

The affiant, James Z. Davis, being first duly sworn deposes and states:

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7. The Board found that Respondent had been properly served by mailing a copy

of the summons and formal complaint to the office of Jamis Johnson where Respondent had been practicing law and where arrangements had been made by Bar Counsel to have the documents forwarded to Respondent. The Board found that Respondent currently had possession of a copy of the summons and formal complaint, was aware of the nature of the charges against him, that he had already participated in a trial on the merits of his case and had the opportunity to present matters in defense, extenuation, and mitigation, and that he was not entitled to the relief he requested as a matter of law. However, the Board concluded in the interests of fairness they would grant him a second hearing on his case at such time as he filed his Answer. Accordingly, he was

ordered to file his Answer to the formal complaint within ten (10) days.

8. Neither Respondent or a representative of the Office of Bar Counsel was present during the deliberations of the Board regarding Respondent's Motion.

9. When the decision was reached I instructed Assistant Bar Counsel, Wendell K. Smith, to draft the Findings of the Board and an Order based upon the decision of the Board. Attached to this Affidavit as Exhibit A, and incorporated herein, is a copy of the Order I signed on June 8, 1992, and it accurately reflects the decision of the Board of Bar Commissioners.

Dated this 12 day of November, 1992.

_____

James Z. Davis

Subscribed and sworn before me this 12th day of November, 1992.

_____

Notary Public
Residing in Weber County

SEAL

IN THE SUPREME COURT
OF THE STATE OF UTAH

---

In the matter of the
Complaint by

| | |
|---|---|
| CAREN SERR | CERTIFICATE OF READINESS FOR SUPREME COURT REVIEW |
| against | |
| A. PAUL SCHWENKE<br>DOB: 10-12-51<br>ADM: 05-09-83 | F-322 |

---

COMES NOW, John C. Baldwin, Executive Director of the Utah State Bar and hereby certifies that the Order and Recommendation for the Order of Discipline: Disbarment was mailed postage prepaid to the Respondent on September 9, 1992 at his address as reflected in the official Attorney Registry of the Utah State Bar and that the Respondent has not filed a Petition for Amendment, Modification or Reconsideration

as required by Rule XII(f).

DATED this 16th day of October, 1992.

_____

John C. Baldwin
Executive Director.

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH
October 23, 1992

OFFICE OF THE CLERK

---

A. Paul Schwenke
Attorney at Law
75 East 400 South, #302
Salt Lake City, Ut. 84111

In re: A. Paul Schwenke
F-322 No.920480

Pursuant to Rule 13 of the Utah R. App. P. the record on appeal has been filed. The appellant's brief is due December 2, 1992. The record in this case may be withdrawn from the Supreme Court only upon written request of the attorney of record.

GEOFFREY J. BUTLER

CLERK

SUPREME COURT, U.S.
FILED
JUL 13 1994
OFFICE OF THE CLERK

Case Number 932089

THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

A. Paul Schwenke,
Petitioner,

v.

Utah State Bar,
Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

## Brief in Opposition

Wendell K. Smith
OFFICE OF ATTORNEY DISCIPLINE
Counsel of Record
645 South 200 East
Salt Lake City, Utah 84111
Telephone: (801) 531-9110
Facsimile: (801) 531-0660

BEST AVAILABLE COPY

Case Number 932089

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THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

---

A. Paul Schwenke,
Petitioner,

v.

Utah State Bar,
Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

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## Brief in Opposition

---

Wendell K. Smith
OFFICE OF ATTORNEY DISCIPLINE
Counsel of Record
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Salt Lake City, Utah 84111
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Facsimile: (801) 531-0660

## QUESTIONS PRESENTED FOR REVIEW

1. Should this Court examine, as a reviewing court, the action of a State Supreme Court in disbarring a member of the Bar of that state for professional misconduct?

2. Should this Court act as a court of appeals to review evidence and factual issues decided in state courts?

3. Was Petitioner afforded due process in an attorney disciplinary action when he was served with the Summons and Complaint by certified mail to his law office under the following circumstances:

(a). the Procedures of Discipline of the Utah State Bar, promulgated by the Utah Supreme Court, provided for service by certified mail;

(b). Petitioner's whereabouts

were unknown to the Utah State Bar;

(c). prior arrangements had been made with Petitioner's associate to forward to Petitioner all correspondence sent to that office from the Bar;

(d). Petitioner had asked this same associate to watch for and forward to him correspondence from the Bar;

(e). the Summons and Complaint were received at Petitioner's law office about six weeks before he left the State; and

(f). Petitioner had "contacts" with this office between the time the Summons and Complaint were received and the time he left the State?

4. Should Petitioner be granted a Writ of Certiorari to consider an

allegation of racial discrimination under the following circumstances:

a. the allegation was not raised by Petitioner at his disciplinary hearing;

b. Petitioner raised it after the hearing in a motion filed with the Board of Bar Commissioners;

c. Petitioner withdrew the allegation at a personal hearing before the full Board of Bar Commissioners; and

d. Petitioner did not raise this issue on Appeal to the State Supreme Court?

## TABLE OF AUTHORITIES

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## OTHER DECISIONS

Serr v. Schwenke and Bruce Udall, Third Judicial District Court, In and For Salt Lake County, Utah, Civil No. 88-01441 (1989).....2

## JURISDICTION OF THIS COURT

This Court has taken the position that it has no authority to re-examine or reverse, as a reviewing court, the action of a State Supreme Court disbarring a member of the Bar of the courts of that state for personal or professional misconduct, Selling v. Radford, 243 U.S. 46, 50 (1917).

## STATEMENT OF THE CASE

Petitioner was accused of violating the Rules of Professional Conduct of the Utah State Bar by misappropriating approximately $100,000.00 from his client which came into his possession in the course of settling her personal injury case.

The disciplinary Complaint filed by the Utah State Bar against Petitioner incorporated by reference a Stipulation signed by him in the Third Judicial

District Court of Salt Lake County, Utah, in the case of Serr v. Schwenke and Bruce Udall, Civil No. 88-01441. In that civil case, Petitioner confessed to a judgment of fraud not dischargeable in bankruptcy, in the amount of $100,000.00, less credits for payments to the client. (R. 100-109)

When the Complaint was issued in the Bar disciplinary action, Petitioner's whereabouts were not known to the Bar. The Procedures of Discipline then in effect provided for service of process in attorney disciplinary actions by certified mail to his last known address as shown on the official roster of attorneys of the Bar. (Petition at 20)

An investigation by the Office of Bar Counsel determined that the most likely way Petitioner would actually receive the pleadings, would be to send them to the office where he had recently practiced

law. Petitioner's office associate would not provide the Bar with Petitioner's forwarding address but agreed to forward to him all documents sent to that address by the Bar. (R. 171-178)

In reliance upon the representations of Petitioner's associate, the Summons and Complaint were served upon Petitioner by mailing them by certified mail on December 4, 1990, to his law office at 165 South West Temple, Suite 300, Salt Lake City, UT 84111. (Petition Appendix Av-1-17) The documents were received on December 5, 1990. (R. 109) Unknown to the Bar, Petitioner was still in Salt Lake City and had contacts with his office until he left the State of Utah on or about January 15, 1991. (R. 124-126)

The Disciplinary Hearing Panel, the Board of Bar Commissioners and the Utah Supreme Court found that service by

certified mail to the last address where Petitioner recently practiced law, constituted valid service of process under the Procedures of Discipline of the Utah State Bar based upon the facts and circumstances of this case. (R. 182-195) (R. 142-143)

Default was subsequently entered and on December 6, 1991, a Notice of Hearing setting the Sanctions Hearing for March 2, 1992, was sent to Petitioner by certified mail addressed to a residence in Las Vegas, Nevada. This action was taken based upon information and belief of the Office of Bar Counsel that Petitioner was residing at the Las Vegas address. (R. 079-080) A copy of the Notice of Hearing was also mailed to Petitioner by certified mail to a post office box in Murray, Utah, his last known address as shown by the official roster of attorneys of the Bar.

Petitioner testified at a Sanctions Hearing on March 2, 1992, that he was in Salt Lake City on or about February 6, 1992. He claims that on this date he learned from his former law associate that something was pending against him at the Bar and a hearing was to be held sometime in March, 1992. However, notice of the Sanctions Hearing had not been sent to Petitioner's former associate. (Transcript of Sanctions Hearing, TSH. 16-19) (Petition Appendix Av-4-32 through Av-4-38)

Petitioner did not contact the Bar, but instead returned to Las Vegas and collected his mail whereby he learned of the pending disciplinary proceedings. Petitioner subsequently appeared at the Sanctions Hearing at the correct time and on the correct date and at the correct location. The date, time and location of

the hearing could only have been obtained from the mail he collected in Las Vegas. Petitioner never claimed to have received the notice sent to his post office box in Utah. (TSH. 16-19) (Petition Appendix Av-4-32 through Av-4-38)

The Hearing Panel found he had been properly served with the Summons and Formal Complaint and that Default had been properly entered. (TSH. 21-28) Nevertheless, at the Sanctions Hearing witnesses were called and testified to the substance of the charges. The witnesses were cross-examined by Petitioner. Petitioner testified under oath in his own defense. Documents substantiating Petitioner's offenses were also admitted into evidence including the Stipulation he signed in the State District Court admitting to the charges. (TSH. 42-135) (Bar Ex. 3; TSH. 38-39)

The Hearing Panel entered Findings of Fact, Conclusions of Law, and Recommendations wherein they found that Petitioner had violated the Rules of Professional Conduct as charged misappropriating money belonging to his client. The Panel recommended his disbarment and restitution of $97,250.00. (R. 182-195)

Petitioner filed objections to these Findings with the Board of Bar Commissioners wherein he alleged he had not been properly served with the Summons and Formal Complaint and that the decision of the Panel was based on racial prejudice. (R. 200-211)

Petitioner was granted a personal hearing before the Board of Bar Commissioners. During that hearing, he dropped his allegation of racial discrimination as verified by the

Affidavit of the President of the Utah State Bar. (R. 124-126) This issue was never presented to or decided by the Utah Supreme Court. See Petitioner's Brief pages 4-6. (Petition Appendix Av-19-2 and Av-24-1-5 through Av-24-1-10)

After a number of motions were filed and resolved, the Board of Bar Commissioners approved the Findings, Conclusions and Recommendations of the Hearing Panel on September 3, 1992. In his appeal to the Utah Supreme Court Petitioner raised the issue of service of process and the Statute of Limitations. The relief sought by Petitioner was denied and he was disbarred. In re Schwenke, 865 P.2d 1350 (Utah 1993).

## ARGUMENT SUMMARY

This Court has consistently declined to examine, as a reviewing court, the action of a State Supreme Court in

disbarring a member of the Bar of that State for professional misconduct or to act as a court of appeals to review evidence and factual issues decided in state courts.

This Court has also consistently declined to review claims that constitutional rights have been violated when those claims have not been raised and passed upon by the State Supreme Court.

Petitioner was afforded due process in an attorney disciplinary action when he was served with the Summons and Complaint by certified mail to his last known address in accordance with the criteria established by this Court.

## ARGUMENT

### Petitioner's Misstatements of Fact

Rule 15 of the Rules of the Supreme Court of the United States affords a Respondent the opportunity to list

misstatements of fact in the Petition. Petitioner has misstated facts too numerous to discuss due to the limitations on the length of this Brief. The Court is directed to the Statement of the Case in this Brief. Following are some of the more material misstatements of fact in the Petition for Writ of Certiorari.

1. In the Statement of the Case, Page 5 of the Petition, Petitioner alleges the Hearing Panel did not conduct a hearing to establish the merits of the Formal Complaint. The Hearing Panel in fact held a hearing on the merits of the Formal Complaint as verified by the transcript of the hearing. (Petition Appendix, Volume Two)

2. In the Statement of the Case, Page 6 of the Petition, Petitioner alleges he raised "the" disparate treatment issue before the Hearing Panel on March 2, 1992.

During the hearing Petitioner argued he was entitled to the same sanction as another attorney in his office who shared in some of the money taken from Petitioner's client. However, he did not raise the issue of racial discrimination. (TSH pp. 145-146) (Petition Appendix Av-4-267 to 271) Petitioner did not raise the issue of racial discrimination in his appeal to the Utah Supreme Court. (Appellant's Brief Pages 4-6) (Petition Appendix Av-24-1-5 to Av-24-1-10)

3. In the Statement of the Case, Pages 9-10 of the Petition, Petitioner alleges as part of his due process argument that there were no facts in the record to support the finding of the Utah Supreme Court that he received notice of the Sanctions Hearing from documents mailed to him by the Bar to his Las Vegas address. Petitioner falsely implies he

learned of the date and time of the March 2, 1992, Sanctions Hearing from his former associate, Jamis Johnson. Petitioner then cites a portion of the transcript of the Sanctions Hearing. However, he omits those portions that refute his allegation and which support the findings of the Utah Supreme Court that this information came from the notice mailed to him by the Bar at an address in Las Vegas.

Petitioner testified at the Sanctions Hearing that on February 6, 1992, Mr. Johnson told him "there was something pending" against him at the Bar "sometime in March." (Petition Appendix Av-4-35-36). Subsequently, Petitioner returned to Las Vegas where he "collected a lot of the mails" sent to the Las Vegas address. (Petition Appendix Av-4-37) Since he had not learned the date, time and location of the hearing from Mr. Johnson, and since

Petitioner, in fact, appeared at the hearing on the proper date and at the correct time, he could only have obtained this information from the notice mailed to Las Vegas. Petitioner never mentioned collecting his mail from his Utah mail box. The record of trial shows that notice of the Sanctions Hearing was never sent to Petitioner's former associate. (TSH. 17-19)

4. On Pages 25 through 42 of the Petition, Petitioner makes allegations of criminal fraud on the part of the Office of Bar Counsel including allegations of tampering with the court record and submitting false affidavits. Bar Counsel denies Petitioner's false and defamatory allegations.

The Affidavit of Bar Counsel, Stephen A. Trost, referenced in the Petition is true and accurate. It was referenced in

Appellee's Brief filed with the Utah Supreme Court, attached thereto as Appendix C, and served on Petitioner on or about July 22, 1993. Petitioner did not challenge this Affidavit in his appeal to the Utah Supreme Court. If it was inadvertently omitted from prior documents, in which it was also referenced, Petitioner did not bring this to the attention of the Office of Bar Counsel, or raise the issue on appeal.

If there are any irregularities in the court record, the Bar Counsel asserts that they occurred in the handling of the record by the court clerk or at the hands of Petitioner who had exclusive control of the record in preparing his appeal.

5. On Pages 58-59 of his Petition, Petitioner claims there was nothing in the Appellate record to support the finding of the Utah Supreme Court that he had

withdrawn his allegations of racial discrimination. The President of the Utah State Bar, who was present and presided at the hearing before the Board of Bar Commissioners, signed an Affidavit verifying that Petitioner appeared and withdrew his allegations of racial discrimination. This Affidavit is part of the record of the proceedings before the Board of Bar Commissioners and was properly considered by the Utah Supreme Court. (R. 124-126)

Petitioner did not challenge the Affidavit of the President of the Utah State Bar in his appeal. (Appellate Brief 4-6) (Petition Appendix Av-24-1-5 to Av-24-1-10)

6. On Pages 44-47 of his Petition, Petitioner alleges that the Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline dated

September 3, 1992, applied only to the Default entered against him on July 31, 1992, and that the Default entered in March, 1991, was not properly before the Utah Supreme Court. This is not correct. The Order of September 3, 1992, incorporates, adopts and affirms the Findings, Conclusions and Recommendations of the Hearing Panel entered March 2, 1992, and reduced to writing on April 20, 1992. The Hearing Panel found Petitioner had been properly served with the Summons and Complaint on or about December 5, 1990, and Default properly entered in March, 1991. (Av-5-1 to Av-5-22) (R.142-143) (Appendix Y, Respondent's Brief)

Petitioner's Misstatements of Law

1. On Page 16 of the Petition, Petitioner cites the cases of Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962) and Clark v. State of Washington, 366 F.2d 678

(9th Cir. 1966) as authority for the proposition that a Writ of Certiorari to the United States Supreme Court is available to an attorney seeking review of a disbarment from state courts. This is incorrect. Both of these cases state that federal courts do not have jurisdiction to review state disciplinary actions. These decisions stand only for the proposition that an attorney disbarred or suspended from the practice of law in state courts may ask this Court that he or she not be disbarred from federal courts within the state.

2. On Page 17 of the Petition, Petitioner cites the cases of Schware v. Board of Examiners, 353 U.S. 232 (1957) and Wilner v. Committee on Character and Ethics, 373 U.S. 96 (1963), for the proposition he has the right to have this Court review this attorney discipline case

on Fourteenth Amendment grounds. These are cases of attorneys seeking admission to practice law, they do not pertain to attorney discipline. This court has consistently refused to review state attorney discipline cases on the grounds alleged by Petitioner.

2. On Pages 20-25 of the Petition, Petitioner erroneously alleges that Rule XI(b) of the Procedures of Discipline of the Utah State Bar requires personal service of the Summons and Complaint. The Rule plainly states that service may be made personally or by registered or certified mail. (Petition at 20)

In a prior disciplinary proceeding involving this Petitioner, the Utah Supreme Court said that actual notice, not personal service, of pending disciplinary proceedings is essential in proceedings involving suspension or disbarment.

(Petition at 21) The Utah Supreme Court in the instant case found that Petitioner did have actual notice based upon the facts of the case. Petitioner is asking this Court to overrule this finding of fact, a request that does not fall within the function of this Court.

2. On Pages 22-23 of the Petition, Petitioner incorrectly alleges that Rule 4(g) of the Utah Rules of Civil Procedure applied to the service of the Summons and Complaint in this attorney disciplinary proceeding. Rule XI(b) of the Procedures of Discipline, not the Rules of Civil Procedure, governed service of process in attorney discipline matters. (Petition at 20)

3. On Pages 40-41 of the Petition, Petitioner construes the decision of the Utah Supreme Court as holding that service of the Summons and Complaint upon him by

certified mail to the last address where he practiced law was somehow service upon his "agent." This was never an issue in his case and the Utah Supreme Court never found that service was obtained through an agent.

## REASONS FOR DENYING THE PETITION

### I

**It is not the function of this Court to review evidence and factual issues decided in state courts.**

Throughout his Petition, Petitioner takes issue with the Findings Fact of the Hearing Panel and the Board of Bar Commissioners regarding the service of the Summons and Complaint and various documents associated with this disciplinary action. He also takes issue with the Utah Supreme Court for adopting those Findings of Fact.

Additionally, he argues for the first time facts that were not advanced before the Hearing Panel, Board of Bar Commissioners, or the Utah Supreme Court. For example, on Pages 34-36 the Petition he refers to alleged facts surrounding his departure from the State of Utah and an alleged Affidavit of Mr. Johnson, that were never presented to the Hearing Panel, the Board of Bar Commissioners or the Utah Supreme Court.

In the case of General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938), this Court held that a Writ of Certiorari would not be granted merely to review evidence or the inferences that can be drawn therefrom.

II

It is not the function of this Court to examine, the action of a State Supreme

Court in disbarring a member of the Bar of that state for professional misconduct.

While the Court has granted review of attorney admission cases, where constitutional issues were raised, it has consistently deferred matters of attorney discipline to State courts. Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).

This court held in the case of Selling v. Radford, 243 U.S. 46, 50 (1917) that it had no authority to re-examine or reverse, as a reviewing court, the action of the Supreme Court of Michigan in disbarring a member of the Bar of the courts of that State for personal or professional misconduct.

In the case of Theard v. United States, 354 U.S. 278 (1957), this Court considered an attorney disbarment case

wherein the State of Louisiana had disbarred an attorney in 1954 for a forgery in 1935 at a time when he was in a state of mental irresponsibility so pronounced that for several years he was in an insane asylum. Thereafter, the lawyer practiced six years preceding the disbarment action with no charges of misconduct. This Court declined to disbar Mr. Theard from practicing before federal courts but did not disturb the State of Louisiana disbarment in accordance with the holding in the case of Selling v. Radford, supra.

In the case of In re Ruffalo, 390 U.S. 544 (1986), an attorney was disbarred by the State of Ohio. This Court found that the attorney was not put on notice that his conduct was a disbarment offense which deprived him of procedural due process. Accordingly, the Court permitted

him to continue to practice before the federal courts but denied his Petition for Writ of Certiorari to consider the merits of his State disbarment.

III

**Petitioner was afforded due process in the service of the Summons and Complaint.**

Petitioner fled the State of Utah, secreted himself from the Utah State Bar, and now cries foul when he was not personally served with the Summons and Complaint in this disciplinary action.

Petitioner cites Rule 4 of the Utah Rules of Civil Procedure in support of his allegation that he was not properly served with the Summons and Complaint. Petitioner is fully aware that this Rule did not then apply to attorney disciplinary proceedings. The Utah Supreme Court promulgated the Procedures

of Discipline of the Utah State Bar which set forth the procedure to be followed in attorney discipline matters. (Petition at 20) Petitioner's disciplinary action was governed by those procedures.

Rule XI(b) of the Procedures of Discipline of the Utah State Bar, then in effect, provided that service could be made personally upon a respondent, or by registered or certified mail, to the last known address as shown by the official roster of attorneys of the Bar.

It is undisputed that Petitioner was not personally served because his whereabouts were unknown to the Bar. As set forth above in the Statement of the Case, Petitioner had been practicing law in Salt Lake City, Utah. The Office of Bar Counsel was acting upon information and belief that Petitioner had stopped practicing law and had left the State

without providing the Bar with his current address.

In reliance upon that information, the Office of Bar Counsel conducted an investigation to determine how Petitioner might be served with the Summons and Complaint in the pending disciplinary action. It was determined that it was unlikely Petitioner would receive the pleadings if they were mailed to his local post office box address. Accordingly, Bar Counsel met with Petitioner's former associate at the location where Petitioner had been practicing law to determine whether Petitioner would receive the pleadings if mailed to that location. Bar Counsel was informed by Petitioner's associate that he would forward to Petitioner all correspondence addressed to Petitioner that was received at the law office. (R. 171-178)

Accordingly, a copy of the Summons and Complaint were sent by certified mail to Petitioner's law office on December 4, 1990. The pleadings were received at that office on December 5, 1990. (R. 100-109) (R.002-011)

Unknown to the Bar, Petitioner had not yet departed the State. He remained in Utah until on or about mid-January, 1991, during which time he had "contacts" with the office to which the pleadings were mailed. (R. 124-126)

The Utah Supreme Court found Petitioner was properly served with the Summons and Complaint. This decision is consistent with other decisions of the Utah Supreme Court regarding service by mail, Carlson v. Bos, 740 P.2d 1269 (Utah 1987); Anderson, dba Image Limousine v. Public Service Commission of Utah, 839 P.2d 822 (Utah 1992).

This Court held in Mullane, v. Central Hanover Bank & Trust Co., 399 U.S. 306, 314 (1950), that due process is satisfied without personal service provided notice is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.

In deciding this issue, the Court noted that the interest of the State must be balanced against the individual interest protected by the Fourteenth Amendment. The Court declined to specify any formula to achieve the balance between these interests but noted that the constitutional requirements are satisfied if the notice is reasonably calculated to apprise the interested parties of the action with due regard for the practicalities and peculiarities of the case.

The action taken by the Utah State Bar in contacting Petitioner's associate, and making arrangements to have documents mailed to that office forwarded to Petitioner, was reasonable in light of the fact that the Bar did not know the whereabouts of Petitioner and could not have effected personal service of process.

This action by the Bar was calculated to notify Petitioner of the initiation of Bar disciplinary proceedings. The means employed by the Bar verify that the Bar was desirous of actually informing Petitioner of the initiation of the action and were reasonably adopted for this purpose.

The fact that the Bar did not merely send a copy of the pleadings by certified mail to Petitioner's post office box, but instead, made arrangements to have the Summons and Complaint forwarded to

Petitioner, constituted action that was reasonably certain under the circumstances, to inform Petitioner of the filing of the Complaint.

These facts satisfy the criteria of Mullane v. Central Hanover Bank & Trust Co., supra, and constitute valid service of process even if Petitioner had not, in fact, received the pleadings. However, the facts show that the Summons and Complaint were received at Petitioner's law office on December 5, 1990, and that he had "contacts" with the office until about mid-January, 1991. This, together with the fact that Petitioner's associate had been asked by the Bar and by Petitioner to be on the lookout for correspondence from the Bar addressed to Petitioner, establishes by clear and convincing evidence that Petitioner had

actual notice of the disciplinary proceedings. (TSH. 5-6)

IV

Petitioner did not raise the issue of racial discrimination in his Appeal to the Utah Supreme Court.

Likewise, the following issues were either not raised on appeal or not considered and passed on by the Utah Supreme Court:

a. the issue regarding the applicability of Rule 4(g) of the Utah Rules of Civil Procedure to this attorney disciplinary case; (Petition at 23)

b. allegations of misconduct by the Utah State Bar; (Petition 25-40)

c. allegations regarding the Affidavit of Bar Counsel Stephen A. Trost; (Petition 25-40)

d. the content of the alleged Affidavit of Jamis Johnson; (Petition 25-40)

e. whether Mr. Johnson was Petitioner's agent for service of process; (Petition 40-41)

f. whether the Notice of the Sanctions Hearing was constitutionally defective due to its content; (Petition at 43)

g. whether subsequent personal service of the Summons and Complaint on Respondent on July 7, 1992, was improper; (Petition 48-50)

h. whether his right to due process was violated when no record was made of the meeting of the Board of Bar Commissioners even though Petitioner did not request that the meeting be recorded; (Petition 51-52)

i. the allegation that Rule 4-504 of the Utah Code of Judicial Administration was not followed; (Petition 53-56) and

j. allegations of record tampering. (Petition 56-58)

**This court will not consider issues not passed on by state courts.**

Petitioner first raised the issue of racial discrimination in his Motion for Reconsideration filed with the Board of Bar Commissioners. This was after the Hearing Panel of the Ethics and Discipline Committee had found his misconduct warranted disbarment.

Petitioner was granted a personal hearing before the Board of Bar Commissioners at their monthly meeting during which he withdrew his allegation of racial discrimination. This is verified by the President of the Board, who is also

the President of the Bar, in his Affidavit. (R.124-126)

Ultimately, the Board of Bar Commissioners approved the Findings, Conclusions and the Recommendation of the Hearing Panel that Petitioner be disbarred. (R. 142-143)

In his Appeal to the Utah Supreme Court, Petitioner presented four issues, none of which were allegations of racial discrimination. This is evidenced by the Appeal Brief filed by Petitioner.

In Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 76 (1988), this Court would not consider, by way of a Writ of Certiorari, an appellant's claims that his due process rights had been violated

when those claims had not been raised and passed upon by the state court.

In Clark v. Jeter, 486 U.S. 456, 459-460 (1988), this Court refused to consider, by way of a Writ of Certiorari, a petitioner's contention that a state statute was invalid since the question was not adequately presented to the state court. This Court said, "It is the practice, when reviewing decisions by state courts, not to decide federal claims that were not pressed or passed upon below." 486 U.S. at 459.

These decisions followed a long line of similar decisions such as Beck v. Washington, 369 U.S. 541 (1962), where the Court refused to consider Petitioner's contention that he was denied equal protection of the law in a criminal case. The Court would not consider the issue

because it was not raised and passed upon by the State Court.

The Court found in Beck that the constitutional issue raised by the Petitioner was not properly before the Court because it was not argued in Petitioner's Brief to the State Supreme Court. While the Petitioner, in that case, had mentioned the issue in one sentence of his Brief, his failure to argue it to the State Supreme Court constituted a waiver or abandonment of the issue. Consequently, this Court held that the issue having not been raised with the State Supreme Court could not be entertained by the United States Supreme Court.

On Page 554 of the Beck opinion, the Court noted that time and time again the Court had stated that the 14th Amendment does not assure uniformity of decisions or immunity from judicial error. Otherwise,

every alleged misapplication of state law would constitute a federal constitutional question.

V

None of the grounds advanced by Petitioner satisfy the requirements of Rule 10 of the Rules of the Supreme Court for granting a Writ of Certiorari.

CONCLUSION

For the above-stated reasons, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

DATED this 12th day of July, 1994.

OFFICE OF DISCIPLINARY COUNSEL
OF THE UTAH STATE BAR

By: _____
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